

No. 91-122-CFX
Status: DECIDED

Title: PFZ Properties, Inc., Petitioner
v.
Rene Alberto Rodriguez, et al.

Docketed:
July 22, 1991

Court: United States Court of Appeals
for the First Circuit

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Counsel for respondent: Ramirez, Vanessa, Rodriguez-
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Entry	Date	Note	Proceedings and Orders
1	Jul 22 1991	G	Petition for writ of certiorari filed.
2	Aug 21 1991		DISTRIBUTED. September 30, 1991
3	Sep 6 1991	P	Response requested -- JPS. (Due October 7, 1991)
4	Oct 17 1991		Brief of respondents Rodriguez, et al. in opposition filed.
5	Oct 23 1991		REDISTRIBUTED. November 8, 1991
6	Oct 30 1991	X	Reply brief of petitioner PFZ Properties, Inc. filed.
7	Nov 12 1991		Petition GRANTED. limited to Question 2 presented by the petition. *****
14	Dec 26 1991		Brief amicus curiae of Pacific Legal Foundation filed.
8	Dec 27 1991		Joint appendix filed.
9	Dec 27 1991		Brief of petitioner PFZ Properties, Inc. filed.
11	Dec 27 1991		Brief amicus curiae of Institute for Justice filed.
12	Dec 27 1991	G	Motion of National Association of Home Builders for leave to file a brief as amicus curiae filed.
13	Dec 27 1991		Brief amici curiae of Washington Legal Foundation, et al. filed.
10	Jan 2 1992		SET FOR ARGUMENT WEDNESDAY, FEBRUARY 26, 1992. (2ND CASE)
19	Jan 17 1992		Record filed.
		*	Partial proceedings and briefs United States Court of Appeals for the First Circuit.
16	Jan 21 1992		Motion of National Association of Home Builders for leave to file a brief as amicus curiae GRANTED.
20	Jan 24 1992		Record filed.
		*	Original proceedings U. S. District Court, Puerto Rico (1 Box)
18	Jan 28 1992		CIRCULATED.
22	Jan 28 1992	X	Brief amicus curiae of Municipal Art Society of New York filed.
23	Jan 28 1992		Brief amici curiae of Council of State Governments, et al. filed.
21	Feb 3 1992	X	Brief amici curiae of State Of Maryland, et al. filed.
24	Feb 3 1992	X	Brief of respondents Rodriguez, et al. filed.
25	Feb 18 1992	X	Reply brief of petitioner PFZ Properties filed.
26	Feb 26 1992		ARGUED.
27	Mar 9 1992		Writ of certiorari DISMISSED as improvidently granted. Opinion per curiam.

91-122

No. 91-

JUL 22 1991

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PFZ PROPERTIES, INC.,
Petitioner,

v.

RENE ALBERTO RODRIGUEZ, et al.,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT**

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July 22, 1991

QUESTIONS PRESENTED

Whether a procedural due process claim is stated under 42 U.S.C. § 1983 when high-level state officials exercise broadly delegated power and authority to effect a deprivation of a property interest, notwithstanding their duty to implement procedures to prevent the deprivation.

Whether an arbitrary, capricious or illegal denial of a construction permit to a developer by officials acting under color of state law can state a substantive due process claim under 42 U.S.C. § 1983.

LIST OF PARTIES AND RULE 29 LIST

The appellant in the case below is the petitioner herein, PFZ Properties, Inc. ("PFZ"). PFZ was the plaintiff in the District Court action from which the appeal was taken.

The appellees in the case below are the respondents herein and include:

- (1) Rene A. Rodriguez, in his individual capacity;
- (2) Salvador Arana, in his capacity as Administrator of the Regulations and Permits Authority of the Commonwealth of Puerto Rico; and
- (3) the Regulations and Permits Authority of the Commonwealth of Puerto Rico.

Petitioner PFZ Properties, Inc. is a privately held corporation and has no publicly owned parent, subsidiary or affiliate.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 29 LIST	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
I. THE PETITION SHOULD BE GRANTED TO CLARIFY THE REQUIREMENTS OF PROCEDURAL DUE PROCESS OUTLINED IN <i>ZINERMON V. BURCH</i> WHEN HIGH-LEVEL STATE OFFICIALS EXERCISE BROADLY DELEGATED POWER AND AUTHORITY TO EFFECT THE DEPRIVATION OF A PROTECTED PROPERTY INTEREST, NOTWITHSTANDING THEIR OBLIGATION TO IMPLEMENT PROCEDURES TO PREVENT THE DEPRIVATION COMPLAINED OF	7
II. THE PETITION SHOULD BE GRANTED TO RESOLVE THE SPLIT OF AUTHORITY IN THE CIRCUIT COURTS ON THE ISSUE OF WHETHER THE ARBITRARY AND CAPRICIOUS DENIAL OF A CONSTRUCTION PERMIT TO A DEVELOPER CAN EVER CONSTITUTE A SUBSTANTIVE DUE PROCESS VIOLATION	12
CONCLUSION	16
APPENDIX	A-1

TABLE OF AUTHORITIES

CASES:

<i>Acorn Ponds v. Incorporated Village of North Hills</i> , 623 F. Supp. 688 (E.D.N.Y. 1985)	14
<i>Bello v. Walker</i> , 840 F.2d 1124 (3d Cir.), <i>cert. denied</i> , 488 U.S. 851 (1988)	14
<i>Board of Regents v. Roth</i> , 408 U.S. 564 (1972)	7
<i>Brady v. Town of Colchester</i> , 863 F.2d 205 (2d Cir. 1988) ...	13
<i>Bretz v. Kelman</i> , 773 F.2d 1026 (9th Cir. 1985)	10
<i>Caine v. Hardy</i> , 905 F.2d 858 (5th Cir. 1990)	11
<i>Chiplin Enterprises, Inc. v. City of Lebanon</i> , 712 F.2d 1524 (1st Cir. 1983)	12, 14
<i>Daniels v. Williams</i> , 474 U.S. 327 (1986)	13
<i>Davidson v. Cannon</i> , 474 U.S. 344 (1986)	13
<i>Easter House v. Felder</i> , ___ U.S. ___, 110 S. Ct. 1314 (1990) ..	11
<i>Easter House v. Felder</i> , 910 F.2d 1387 (7th Cir. 1990), <i>cert. denied</i> , ___ U.S. ___, 111 S. Ct. 783 (1991)	11
<i>Fetner v. City of Roanoke</i> , 313 F.2d 1183 (11th Cir. 1987) ...	10
<i>Fields v. Durham</i> , ___ U.S. ___, 110 S. Ct. 1313 (1990)	11
<i>Freeman v. Blair</i> , 793 F.2d 166 (8th Cir. 1986), <i>vacated on other grounds</i> , 483 U.S. 1014 (1987)	10
<i>Hudson v. Palmer</i> , 468 U.S. 517 (1984)	9
<i>Littlefield v. City of Afton</i> , 785 F.2d 596 (8th Cir. 1986) ...	13, 14

<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422 (1982)	7
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	9
<i>New Burnham Prairie Homes v. Village of Burnham</i> , 910 F.2d 1474 (7th Cir. 1990)	13, 14
<i>Parks v. Watson</i> , 716 F.2d 646 (9th Cir. 1983)	14
<i>Parratt v. Taylor</i> , 451 U.S. 527 (1981)	7, 8, 9
<i>PFZ Properties, Inc. v. Rodriguez</i> , 928 F.2d 28 (1st Cir. 1991) . . .	1
<i>PFZ Properties, Inc. v. Rodriguez</i> , 739 F. Supp. 67 (D.P.R. 1990) .1	
<i>Plumer v. State of Maryland</i> , 915 F.2d 927 (4th Cir. 1990) . . .	11
<i>Scott v. Greenville County</i> , 716 F.2d 1409 (4th Cir. 1983) . . .	14
<i>Scudder v. Town of Greendale</i> , 704 F.2d 999 (7th Cir. 1983) . .	14
<i>Shelton v. City of College Station</i> , 754 F.2d 1251 (5th Cir. 1985), <i>cert. denied</i> , 477 U.S. 905 (1986)	14
<i>Southern Cooperative Dev. Fund v. Driggers</i> , 696 F.2d 1347 (11th Cir.), <i>cert. denied</i> , 463 U.S. 1208 (1983)	14
<i>Wilkerson v. Johnson</i> , 699 F.2d 325 (6th Cir. 1983)	14
<i>Wilson v. Civil Town of Clayton</i> , 839 F.2d 375 (7th Cir. 1988) . .	10
<i>Wolfenbarger v. Williams</i> , 774 F.2d 358 (10th Cir. 1985), <i>cert.</i> <i>denied</i> , 475 U.S. 1065 (1986)	10
<i>Zinerman v. Burch</i> , 494 U.S. ___, 110 S. Ct. 975 (1990) . .	<i>passim</i>

CONSTITUTION:

U.S. CONST. amend. XIV, § 1	2
U.S. CONST. amend. XIV, § 5	2

STATUTES:

27 L.P.R.A. Section 72d	6
28 U.S.C. § 1254(1)	2
42 U.S.C. § 1983	<i>passim</i>
Fed. R. Civ. P. 12(b) (6)	3

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

PFZ PROPERTIES, INC.,
Petitioner,

v.

RENE ALBERTO RODRIGUEZ, et al.,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

Petitioner PFZ Properties, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered on March 18, 1991 and the order denying a rehearing entered on April 23, 1991.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit ("Court of Appeals") is reported in *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991), and is reprinted in the Appendix at A-1. The order of the Court of Appeals denying rehearing is not reported. That order is reprinted in the Appendix at A-11. The Court of Appeals affirmed the decision of the United States District Court for the District of Puerto Rico ("the District Court") in *PFZ Properties Inc. v. Rodriguez*, 739 F. Supp. 67 (D.P.R. 1990). The District Court's opinion and order is reprinted in the Appendix at A-13 (hereinafter "App. at ____").

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). Petitioner seeks review of a decision by the Court of Appeals affirming the dismissal by the District Court of claims made by petitioner arising under the United States Constitution and federal law. The Court of Appeals denied petitioner's appeal on March 18, 1991. Petitioner's request for a rehearing by the Court of Appeals was denied in an order entered on April 23, 1991. This petition has therefore been timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case concerns petitioner's attempts to vindicate its rights to due process under the United States Constitution. The Constitutional provision involved is the Fourteenth Amendment. The relevant portions of the Fourteenth Amendment (Sections 1 and 5) provide:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The statutory provision involved in the case, 42 U.S.C. § 1983, provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the

purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Procedural History

This case arises out of a dispute over the development of a large residential and tourist project in the Commonwealth of Puerto Rico. Petitioner's complaint was filed in December 1987 in the District Court under 42 U.S.C. § 1983. An amended complaint was filed in October 1988. The amended complaint alleged, *inter alia*, that the respondents Rene Rodriguez and the Regulations and Permits Authority of the Commonwealth of Puerto Rico ("ARPE" or "the Agency") had violated petitioner's rights to procedural and substantive due process under the Fourteenth Amendment. Petitioner's amended complaint alleged deliberate misconduct by ARPE and Rodriguez, the former Administrator of ARPE. Accordingly, Rodriguez was sued in his individual capacity. Because injunctive relief was sought from ARPE, the current Administrator of the Agency, Salvador Arana, was sued in his official capacity.

Discovery was completed and the final pretrial order was entered in December 1989. Following the entry of the same, the District Court granted a motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. PFZ filed a timely appeal. The Court of Appeals affirmed the dismissal on March 18, 1991. Petitioner sought a rehearing, which request was denied on April 23, 1991.

Facts Material to the Questions Presented

PFZ owns a large tract of land in Puerto Rico in an area known as Vacía Talega. In May 1976, the Planning Board of Puerto Rico adopted a resolution approving a development project for this parcel which had been submitted by PFZ. The Planning Board is the Commonwealth agency which has discretionary authority to make site-specific land use decisions in Puerto Rico. According to the resolution approving the project, development was to proceed in two phases, the first of which was to include approximately 500 hotel rooms, 1,952 residential apartment units, and 1,104 condo-hotel apartment units. Controversy surrounding the project led to a

challenge of the Planning Board approval in the Puerto Rican courts. The Superior Court of Puerto Rico, nonetheless, affirmed the Planning Board's resolution in September 1977. In January 1978, the Supreme Court of Puerto Rico declined to review the Superior Court's decision.

PFZ thereupon timely submitted plans for the development of the first phase of the project to ARPE, another agency of the Puerto Rican government. ARPE approves development plans consistent with Planning Board resolutions. It also issues construction permits based upon construction drawings submitted by developers consistent with approved development plans. ARPE's permit issuing functions are ministerial in nature.

In February 1981, ARPE approved PFZ's development plans by formal resolution. Accordingly, in February 1982, PFZ timely filed construction drawings with ARPE for the first section of the project. This triggered ARPE's statutory duty to process the drawings by performing a technical review of them and issuing a construction permit. In March 1982, ARPE confirmed to PFZ in writing that it had received the construction drawings and sent them to its regional office for processing. Years of delay ensued until PFZ inquired by letter in January 1986 directly to the new Administrator of ARPE, Lionel Motta, about the status of its drawings. Motta directed his subordinates to investigate the matter.

As a result of that investigation, and consistent with ARPE's ordinary procedures, a letter officially notifying PFZ of the status of its drawings and additional information required to complete their processing was prepared and signed by Motta on behalf of ARPE in February 1987. Motta retired two days later. His subordinates, however, never sent the notice letter to PFZ or notified it of the action taken.

Motta was succeeded as Administrator by respondent Rene Rodriguez. As a political appointee, he served at the pleasure of the Governor. In the wake of Motta's retirement, Rodriguez and his senior deputies embarked upon a deliberate, orchestrated course of inaction to delay indefinitely the processing of PFZ's drawings and the issuance of the construction permit. During the remainder of 1987, these senior ARPE officials, acting under the personal direction of Rodriguez, prevented the processing of PFZ's drawings and

refused to respond to written and verbal inquiries regarding their status. Consistent with this conduct, when Rodriguez was advised of the existence of the February 1987 notice letter, he ordered a senior deputy to remove it from the project file and give it to his secretary to conceal in a locked file cabinet to which only she and Rodriguez had access.¹

In December 1987, the president of PFZ had an informal, private conversation with Amadeo Francis, a Special Advisor to the Governor of Puerto Rico. Francis ostensibly had no official responsibilities with respect to ARPE functions. He revealed, nonetheless, that the Governor had determined some time before to keep the project from going forward for personal and political reasons, and that the project would not be resolved on the merits. This was wholly inconsistent with the status of the project. The matter was beyond any stage of policy review and the only legitimate inquiry for ARPE was into the technical merits of drawings submitted for review.

Based on Francis' information and the continued stonewalling by ARPE, PFZ filed its original complaint in the District Court on December 28, 1987. The complaint alleged that ARPE's continued refusal to process the construction plans and issue the associated permits constituted a violation of PFZ's rights to due process.

In August 1988, without prior notice or opportunity to be heard, PFZ was informed by ARPE that it would not receive a construction permit, because its project had ceased to have effect. ARPE also advised PFZ that the 1976 Planning Board Resolution and the 1981 ARPE Resolution were no longer in effect. The decision was ostensibly premised on a finding that PFZ had not submitted any construction drawings. In fact, senior ARPE officials, including the Deputy Administrator and the Assistant Administrator for Regional Operations, acting on instructions from Administrator Rodriguez, had conducted a sham review in which they deliberately reviewed the

¹ The existence of the notice letter was not discovered by PFZ until the deposition of Rene Rodriguez in June 1989. In his deposition, Rodriguez acknowledged that the execution of the letter was an official act which should have been carried out. Its contents were not revealed until a copy was produced by ARPE just before the close of discovery in November 1989. The letter is discussed in the District Court opinion, but not in the opinion of the Court of Appeals. App. at A-16.

wrong file.² They then concluded that the construction drawings had never been submitted, so no permit could issue. At the direction of the Administrator and with the knowledge and acquiescence of his senior subordinates, it was also determined that the decision to deny the project would be made without providing a predeprivation hearing. This decision was inconsistent with customary ARPE practice and procedure.

PFZ requested reconsideration of the decision. Administrator Rodriguez personally directed the reconsideration and responded on behalf of ARPE, denying the request. PFZ petitioned for review of ARPE's decision in the Superior Court and Supreme Court of Puerto Rico. Review in both courts was discretionary and, if granted, limited by statute exclusively to issues of law.³ The petitions for review were denied by the Puerto Rican courts.

PFZ filed its amended complaint in federal district court in October 1988, alleging that the respondents' deliberate misconduct in denying the project and continuing to refuse to process the construction drawings deprived PFZ of its rights to procedural and substantive due process under the Fourteenth Amendment to the United States Constitution. Following the completion of discovery, respondents moved to dismiss the amended complaint.

The District Court granted the motion to dismiss the amended complaint. In doing so, it held that the post-deprivation administrative and judicial process afforded to PFZ under Puerto Rico law was constitutionally sufficient for purposes of procedural due process. It also held that PFZ had failed to state a claim for violation of its rights to substantive due process, in light of the view repeatedly expressed by the First Circuit that controversies involving rejections of land development projects and denials of building permits cannot rise to the level of substantive due process violations. The Court of Appeals affirmed on essentially the same grounds.

² During the course of the briefing in the District Court, respondents admitted the error, but asserted it was unintended. Petitioner alleged it was deliberate, which allegation was amply supported by the record in the case.

³ See 23 L.P.R.A. Section 72d. App. at A-28.

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED TO CLARIFY THE REQUIREMENTS OF PROCEDURAL DUE PROCESS OUTLINED IN *ZINERMON V. BURCH* WHEN HIGH-LEVEL STATE OFFICIALS EXERCISE BROADLY DELEGATED POWER AND AUTHORITY TO EFFECT THE DEPRIVATION OF A PROTECTED PROPERTY INTEREST, NOTWITHSTANDING THEIR OBLIGATION TO IMPLEMENT PROCEDURES TO PREVENT THE DEPRIVATION COMPLAINED OF

PFZ's complaint alleged denial of its rights to procedural due process by the former Administrator of ARPE and senior ARPE officials acting on behalf of the Agency. In particular, it claimed the right to a predeprivation hearing before its project was denied. The Court of Appeals' decision below was thus properly premised on an analysis of the issue of "whether there was adequate process."⁴ The Court's analysis relied principally upon *Parratt v. Taylor*, 451 U.S. 527 (1981). Citing *Parratt*, the Court concluded that PFZ was not entitled to predeprivation process, because the deprivation of its property interest was alleged to have resulted from an illegal departure by state officials from prescribed procedures. Opinion App. at A-5.

The Court of Appeals, however, failed to address the fact that it was the senior officials of the Agency, including the Agency Administrator, who personally effected the deprivation complained of. These high-level officials were not only authorized to effect the deprivation complained of, but they were also charged with responsibility to see that appropriate process was provided to PFZ to

⁴ Procedural due process requires two inquiries: (1) whether there is a property interest and (2) whether there was adequate process. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). With respect to the first inquiry, the Court of Appeals presumed PFZ possessed a property interest for purposes of its analysis. Because the Court of Appeals assumed the existence of a protected property right, predeprivation process was paramount. *Zinerman v. Burch*, 494 U.S. ___, 110 S. Ct. 975, 984 (1990); *Board of Regents v. Roth*, 408 U.S. 564, 571 (1972).

prevent the deprivation.⁵ As such, the Court of Appeals' reliance on *Parratt* was misplaced and its decision is inconsistent with the Supreme Court's more recent decision in *Zinermon v. Burch*, 494 U.S. ___, 110 S. Ct. 975 (1990). *Zinermon* found that *Parratt* did not control when state officials are given broad discretionary power and authority to effect the deprivation complained of and have a duty to prevent the same.⁶ As is more fully explained *infra*, the opinion below is also inconsistent with other circuit court decisions which have specifically found that *Parratt* does not apply when high-ranking state officials use their state-delegated authority to effect a deprivation if they had the power to provide a hearing before they did so. See discussion at 10-11.

The Supreme Court has consistently held that fundamental and elementary requirements of procedural due process require that any deprivation of a protected property interest ordinarily be preceded by notice and a meaningful opportunity to be heard.⁷ *Zinermon v. Burch*, 494 U.S. at ___, 110 S. Ct. at 984. *Parratt* represents a narrow departure from that preferred approach which has been recognized by the Supreme Court. The *Parratt* rule provides that post-deprivation remedies are all the process that is due, if they are the only remedies the state could be expected to provide. 451 U.S. at 541. In *Parratt*, a state prisoner brought a § 1983 action because prison employees negligently lost his mail. *Id.* at 543-44. The Supreme Court concluded that the "random and unauthorized" nature

⁵ ARPE provided predeprivation process to similarly situated proponents of approved projects under its customary practices and procedures.

⁶ Though argued at length in the petitioner's briefs below, *Zinermon* is not discussed in the Court of Appeals' opinion.

⁷ Government interests may excuse the failure to provide predeprivation process if the government demonstrates that there are "extraordinary situations" that require speedy state action or that make the provision of predeprivation process impractical or burdensome. *Zinermon*, 494 U.S. at ___, 110 S. Ct. at 984, citing *Logan*, 455 U.S. at 436. ARPE proffered no extraordinary circumstances necessitating quick state action in PFZ's case and there were none. Moreover, the case had been pending 6 years without any concern by the Agency for quick action. Furthermore, because ARPE ordinarily provided predeprivation process under its customary practice and procedures, the Agency could not and did not claim that predeprivation process was impractical or burdensome.

of the loss of property made it impossible for the state to predict such deprivations and thus provide predeprivation process. Accordingly, post-deprivation remedies were all the process that was due. *Parratt*, 451 U.S. at 541. See also *Zinermon v. Burch*, 494 U.S. ___, 110 S. Ct. at 985-86 (discussing the *Parratt* rule).⁸

The Supreme Court extended the *Parratt* reasoning to certain intentional deprivations of property in *Hudson v. Palmer*, 468 U.S. 517 (1984). That case involved the alleged deliberate and malicious destruction of a prison inmate's legal papers by a prison guard. In *Hudson*, as in *Parratt*, the court found that the state official was not acting pursuant to any established state procedure, but instead was pursuing a "random and unauthorized" act. The Court pointed out that the state could no more anticipate and control in advance such "random and unauthorized" intentional conduct of its employees than it could anticipate similar negligent conduct. *Id.* at 533. Accordingly, post-deprivation remedies were adequate.

The Court of Appeals' reliance on *Parratt* implicitly assumed that, because the respondents did not act in accordance with ARPE's established procedure, their actions were "random and unauthorized." *Zinermon*, however, forecloses such an assumption. As the Supreme Court explained, actions by state officials cannot be "random and unauthorized" if the state has delegated to them broad power and authority to effect the deprivation complained of and they also have a duty to implement procedural safeguards to prevent the deprivation. 494 U.S. at ___, 110 S. Ct. at 989-90.

In the petitioner's case, it was the Administrator of the Agency and his senior deputies who deprived PFZ of its protected interest through the use of their official station. The Commonwealth had thus delegated to Rodriguez and his senior deputies the power and authority to effect the very deprivation complained of. At the same time, those high-level officials had a duty to implement ARPE's

⁸ *Parratt* is actually a special application of the second factor of the three-part analysis of procedural due process identified in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). See *Zinermon*, 494 U.S. at ___, 110 S. Ct. at 985. The second factor in the *Mathews* test provides that the Court must weigh the risk of an erroneous deprivation of the private interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards. 424 U.S. at 335.

customary practices and procedures by providing a predeprivation hearing. As such, their conduct was not "random or unauthorized." *Id.* The personal involvement of the Agency Administrator carried with it the endorsement of the state apparatus. At all times, Rodriguez exercised the broad and uncircumscribed authority conferred upon him as the Administrator of the agency to orchestrate and control the process through which PFZ's construction drawings were reviewed and its property interest was deprived. The state employees in *Parratt* and *Hudson* had no similar broad, delegated authority to deprive prisoners of their property, and no similar duty to initiate required procedural safeguards before deprivation occurred.

Zinermon's facts did not present the specific question of when, if ever, actions of the head of a state agency which effect a deprivation would constitute "random and unauthorized" conduct such that *Parratt* would apply. However, *Zinermon* did appear to validate the analysis of prior circuit decisions which had focused on the power and authority delegated to high-level officials in determining that their conduct was not "random and unauthorized" within the meaning of *Parratt*. *Zinermon*, 494 U.S. at ___, n. 2, 110 S. Ct. at 978, n. 2. A number of those circuit decisions directly conflict with the approach of the Court below insofar as it viewed the Agency Administrator's conduct as falling within the scope of *Parratt*. See, e.g., *Wilson v. Civil Town of Clayton*, 839 F.2d 375 (7th Cir. 1988) (officials employed at such high levels of local government that deprivation may have been the result of state procedures established by defendants for purpose of depriving plaintiff of his rights); *Fetner v. City of Roanoke*, 313 F.2d 1183, 1185 (11th Cir. 1987) (injury to property interest resulting from conscious and deliberate act of city's governing board outside the scope of *Parratt*); *Freeman v. Blair*, 793 F.2d 166, 177 (8th Cir. 1986), *vacated on other grounds*, 483 U.S. 1014 (1987) ("decisions made by the highest officials in the executive branch of state government who have final authority over matters for which they are responsible do not constitute 'random and unauthorized acts'"); *Wolfenbarger v. Williams*, 774 F.2d 358, 365 (10th Cir. 1985), *cert. denied*, 475 U.S. 1065 (1986) (official acts initiated and controlled by the chief law enforcement executive for a jurisdiction could not be characterized as "random and unauthorized" and *Parratt* thus did not apply). See also *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc) ("[t]he *Parratt* analysis, in which the touchstone for predeprivation process is the feasibility of

providing such process, is simply inapplicable where the alleged deprivation is inextricable from the alleged corruption of the process which the State ordinarily could provide.")

Views conflicting with the First Circuit's decision below have also been expressed by other circuits, which have revisited their jurisprudence with respect to the *Parratt-Hudson* rule in the wake of *Zinermon*. For example in *Caine v. Hardy*, the Fifth Circuit, noting that the controlling constitutional authority had changed in light of *Zinermon*, criticized its own earlier decisions which had applied *Parratt* in circumstances where the official who effected the deprivation was a high-ranking employee charged with providing procedural due process for the claimant. *Caine v. Hardy*, 905 F.2d 858, 861 (5th Cir. 1990). See also *Plumer v. State of Maryland*, 915 F.2d 927, 931 (4th Cir. 1990) (when state government can and does provide a predeprivation hearing and charges its employees with effecting the deprivation complained of, availability of state post-deprivation remedy does not satisfy due process). Compare *Easter House v. Felder*, 910 F.2d 1387, 1400 (7th Cir. 1990) (en banc), *cert. denied*, ___ U.S. ___, 111 S. Ct. 783 (1991) (although high-ranking state officials may exercise authority and discretion to effect a deprivation, *Zinermon* does not create a *per se* "employee status" exception to *Parratt*).

In addition, petitioner notes that the Supreme Court has previously granted certiorari and vacated decisions applying *Parratt* from two circuits, remanding for reconsideration in light of *Zinermon*. See *Fields v. Durham*, ___ U.S. ___, 110 S. Ct. 1313 (1990) and *Easter House v. Felder*, ___ U.S. ___, 110 S. Ct. 1314 (1990). In both *Fields* and *Easter House*, the deprivations were predictable and the state could have provided predeprivation process. The deprivations occurred at the hands of state actors who were authorized by the state to take the actions that caused the deprivation. See generally, discussion in *Caine v. Hardy*, 905 F.2d at 862.

Petitioner submits that *Parratt* is inapposite and that an analysis indicated by *Zinermon* should govern situations such as the one presented in the case below. The petition should be granted to resolve the conflict in the circuit courts which has been created by the First Circuit's decision and to further explain the extent to which

the *Zinerman* analysis has narrowed *Parratt* with respect to the denial of procedural due process by high-level officials.

II. THE PETITION SHOULD BE GRANTED TO RESOLVE THE SPLIT OF AUTHORITY IN THE CIRCUIT COURTS ON THE ISSUE OF WHETHER THE ARBITRARY AND CAPRICIOUS DENIAL OF A CONSTRUCTION PERMIT TO A DEVELOPER CAN EVER CONSTITUTE A SUBSTANTIVE DUE PROCESS VIOLATION

Petitioner alleged that the respondents violated its rights to substantive due process when ARPE, acting at the personal direction of Rodriguez, arbitrarily, capriciously, and illegally refused to process its construction drawings and denied its project. PFZ further alleged that the handling of its project was tainted with fundamental procedural irregularities.

Although the Court of Appeals recognized that petitioner had alleged that respondents "violated its rights to substantive due process when ARPE arbitrarily or capriciously refused to process its approved construction drawings," the Court stated that it was constrained to dismiss the case in light of the substantive due process standard that had been set forth in repeated prior pronouncements in the First Circuit. Opinion, App. at A-6-7. The First Circuit standard provides that rejections of development projects and refusals to issue building permits, even if malicious, in bad faith and for invalid or illegal reasons, cannot implicate substantive due process, *unless* the improper motivation is accompanied by the deprivation of *another* specific constitutional right. See *Chiplin Enterprises, Inc. v. City of Lebanon*, 712 F.2d 1524, 1528 (1st Cir. 1983), cited in Opinion, App. at A-6.

The petition should be granted in this case because a significant split in authority exists among the circuits with respect to this issue. At least eight other circuit courts have considered the issue of whether an arbitrary, capricious or illegal denial of a development project or a building permit states a substantive due process claim under § 1983 and have reached an opposite conclusion from the First Circuit. Indeed, the divergence of the First Circuit's view of the appropriate standard from the majority of other circuit courts has

been discussed in a number of circuit decisions. An extensive review of the split in authority is set forth in *Littlefield v. City of Afton*, 785 F.2d 596, 604-07 (8th Cir. 1986),⁹ in which the Eighth Circuit joined in the rejection of the First Circuit standard ("We are persuaded by the *almost* unanimous decisions of our sister circuits that the denial of a building permit under some circumstances may give rise to a substantive due process claim") (emphasis added). *Id.* at 607.

In this regard, petitioner notes that the Due Process Clause of the Fourteenth Amendment serves to prevent the state "from abusing [its] power, or employing it as an instrument of oppression." *Davidson v. Cannon*, 474 U.S. 344, 348 (1986); *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (purpose of Due Process Clause is "to secure the individual from the arbitrary exercise of the powers of government" and "to prevent governmental power from being 'used for purposes of oppression.'"). As such, § 1983 violations of substantive due process occur when, as in this case, defendants' actions are arbitrary, capricious or illegal. See *Davidson v. Cannon*, 474 U.S. at 348 (plaintiff must allege a deprivation which contains some element of abuse of governmental power). The Supreme Court has not previously read into the Fourteenth Amendment a requirement, with respect to the arbitrary and capricious denial of a development project or a building permit by officials acting under color of state law, that a violation of substantive due process must be accompanied by the deprivation of another constitutional right.

Similarly, the majority of the federal circuit courts have not read such a requirement into the Constitution. Instead, a claim for substantive due process may be stated if a party alleges that a denial of a development project or a building permit was the result of arbitrary, capricious or illegal state action. See *Brady v. Town of*

⁹ The *Littlefield* court identified seven circuit courts, the Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh, which had disagreed with the First Circuit approach. These decisions are discussed *infra*. Of these circuits, the Seventh has more recently expressed the view that, in addition to alleging that a decision was arbitrary and irrational, there must be a showing of either a separate constitutional violation or the inadequacy of state law remedies. *New Burnham Prairie Homes v. Village of Burnham*, 910 F.2d 1474, 1481 (7th Cir. 1990). The Second Circuit, on the other hand, apparently has decided to follow those circuits which disagree with the First Circuit approach. See *Brady v. Town of Colchester*, 863 F.2d 205, 216 (2d Cir. 1988).

Colchester, 863 F.2d at 216 (substantive due process may be maintained where there is evidence that party was denied building permit due to political animus); *Bello v. Walker*, 840 F.2d 1124, 1129-30 (3d Cir.), *cert. denied*, 488 U.S. 851 (1988) (denial of developer's building permits for purely personal or political reasons would constitute violation of developer's substantive due process rights); *Littlefield v. City of Afton*, 785 F.2d at 607 (applicants for building permit stated substantive due process claim when they alleged the city acted arbitrarily and capriciously in imposing a condition in granting permit); *Shelton v. City of College Station*, 754 F.2d 1251, 1256-57 (5th Cir. 1985), *cert. denied*, 477 U.S. 905 (1986) (arbitrary deprivation of zoning variance "implicates an invasion of Fourteenth Amendment due process rights"); *Scudder v. Town of Greendale*, 704 F.2d 999, 1002 (7th Cir. 1983) (arbitrary denial of a building permit may be the basis for § 1983 action; decision on the merits found denial of permit was not arbitrary or capricious); *Scott v. Greenville County*, 716 F.2d 1409, 1419 (4th Cir. 1983) (Fourteenth Amendment claim is properly stated where it alleged either abuse of discretion or caprice in a zoning administrator's refusal to issue a building permit); *Wilkerson v. Johnson*, 699 F.2d 325, 328 (6th Cir. 1983) (denial of a license because of bias and the desire to avoid competition violates a property owner's substantive due process rights); *Southern Cooperative Development Fund v. Driggers*, 696 F.2d 1347, 1356 (11th Cir.), *cert. denied*, 463 U.S. 1208 (1983) (imposition of requirements not included in the ordinance upon an applicant for a permit violates substantive due process); *Parks v. Watson*, 716 F.2d 646, 653 (9th Cir. 1983) (condition requiring an applicant for a government benefit to forego constitutional right is unlawful if the condition is not rationally related to the benefit conferred). *See also* *Acorn Ponds v. Incorporated Village of North Hills*, 623 F. Supp. 688, 692-93 (E.D.N.Y. 1985) (allegations of error in application of zoning laws and ordinances, defendants' abuse of power and authority in their positions and delay stated claim under § 1983). *But see* *New Burnham Prairie Homes v. Village of Burnham*, 910 F.2d at 1481 (in addition to alleging that the decision was arbitrary and irrational, plaintiff must also show either a separate constitutional violation or the inadequacy of state law remedies); *Chiplin Enterprises, Inc. v. City of Lebanon*, 712 F.2d 1524 (1st Cir. 1983) (refusal to issue building permit does not implicate substantive due process in the absence of deprivation of another specific

constitutional right).

In light of the First Circuit's repeated adherence to its standard that substantive due process rights are not ordinarily implicated in situations involving the denial of a development project or a building permit notwithstanding facially sufficient allegations of arbitrary, capricious and illegal conduct, and the acknowledged widespread disagreement with this standard expressed in the other federal circuits, the Supreme Court should grant the petition to resolve a well-recognized conflict on this constitutional issue.

CONCLUSION

The petition should be granted to review the decision below because it involves significant constitutional issues of procedural and substantive due process that stand in conflict among the circuits and it is inconsistent with recent Supreme Court precedent.

Respectfully submitted,

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APPENDIX

INDEX TO APPENDIX

1. *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir. 1991) A-1
2. Judgement by the United States Court of Appeals for the First Circuit Affirming the District Court for the District of Puerto Rico Judgment A-10
3. Order Denying Rehearing A-11
4. *PFZ Properties, Inc. v. Rodriguez*, 739 F. Supp. 67 (D.P.R. 1990) A-13
5. Judgment by United States District Court for the District of Puerto Rico Dismissing Case A-25
6. Order Denying Motion for Reconsideration or in the Alternative for Stay of Judgment A-26
7. 23 L.P.R.A. sec. 72d..... A-28

**United States Court of Appeals
For the First Circuit**

No. 90-1723

PFZ PROPERTIES, INC.,
Plaintiff, Appellant,

v.

RENE ALBERTO RODRIGUEZ, ETC., ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Hector M. Laffitte, *U.S. DISTRICT JUDGE*]

Before

Campbell and Cyr, *Circuit Judges*,
and Fuste,* *District Judge*.

Thomas Richichi with whom *Kathryn E. Szmuszkovicz*, *Deborah K. Gunn*, *Beveridge & Diamond, P.C.* and *Jose Luis Novas-Dueno* were on brief for appellant.

Vannessa Ramirez, Assistant Solicitor General, Department of Justice, with whom *Jorge E. Perez Diaz*, Solicitor General, was on brief for appellees.

March 18, 1991

*Of the District of Puerto Rico, sitting by designation.

CAMPBELL, *Circuit Judge*. This case arose out of a dispute over the development of a residential and tourist project in an area known as Vacía Talega in Loiza, Puerto Rico. Plaintiff-appellant PFZ Properties ("PFZ") filed a complaint under 42 U.S.C. § 1983, alleging that defendants Rene Alberto Rodriguez, Salvador Arana, and the Regulations and Permits Authority of the Commonwealth of Puerto Rico ("ARPE") had violated its constitutional rights to procedural and substantive due process and equal protection guaranteed by the Fourteenth Amendment to the United States Constitution. The district court dismissed the complaint pursuant to Fed. R. Civ. P. 12(b) (6) for failure to state a claim. PFZ filed a timely appeal. Because we agree with the district court that PFZ's complaint does not state a valid claim under § 1983, we affirm the dismissal.

I.

As this appeal follows the dismissal of the complaint under Rule 12(b) (6), we accept the factual averments of the complaint as true, and construe these facts in the light most favorable to the plaintiff's case.¹ *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

PFZ owns 1,358.65 cuerdas of land in Loiza, Puerto Rico in an area known as Vacía Talega and Pinones. In May, 1976, the Planning Board of Puerto Rico adopted a resolution approving a Preliminary Development Plan submitted by PFZ for portions of this parcel. According to the approved Plan, development was to proceed in two phases, the first section to include constructing 2,000 hotel rooms and 2,000 residential units on 106 cuerdas, the second to include 6,600 hotel rooms and 6,135 residential units on 266.41 cuerdas. From the beginning, matters did not go smoothly for PFZ. On June 14, 1976, the residents of Barrio Torrecilla Baja, Loiza, Puerto Rico, filed a petition in the Superior Court of Puerto Rico requesting reconsideration of the Planning Board's resolution approving the Preliminary Development Plan and alleging that the Board had failed to consider adequately the development's impact on the environment and the residents of the area.

¹ Plaintiff-appellant complains that, although purporting to evaluate the adequacy of the complaint under Fed. R. Civ. P. 12(b) (6), the district court did not limit its consideration to allegations contained in the pleadings. We need not address this contention, as we limit our own analysis to the allegations in the Amended Complaint. We conclude, wholly apart from factual allegations contained elsewhere in the briefs and in the record, that the plaintiff has failed to state a claim upon which relief can be granted.

The Superior Court affirmed the Board's resolution in September, 1977, and the Supreme Court of Puerto Rico denied review in January, 1978.

On August 19, 1977, the Planning Board extended the time during which PFZ was required to submit preliminary plans to ARPE for the development of Block 1 of the first section until one year after the Superior Court's decision became final, assuming that decision were in PFZ's favor. On August 24, 1978, PFZ submitted preliminary plans for the development of the entire first section to ARPE. In February, 1981, nearly three years later, the plans were approved by ARPE. By this time, the project had been scaled down somewhat — the first section was to include approximately 500 hotel rooms, 1,952 residential apartment units, and 1,104 condo-hotel apartment units on 79.93 cuerdas.

On February 22, 1982, PFZ submitted construction drawings for site improvements for the subdivision works of Block 1 of the first section and preliminary project plans for the structures to be constructed on Block 2 of the first section. On March 24, ARPE returned the preliminary project plans to PFZ, stating that submission of the plans was premature and that, according to the 1981 ARPE Resolution, construction drawings for site improvements must be processed first. ARPE also explained that it had sent the site improvement drawings for Block 1 to its regional office in Carolina, Puerto Rico. There was apparently no communication between PFZ and ARPE for four years. PFZ inquired by letter about the status of the plans in January, 1986; however, ARPE did not answer the letter.

ARPE invited PFZ to attend a meeting in September, 1986 to give a presentation on the project to various agencies of the Commonwealth. During that meeting, the project was discussed, but neither the validity of the 1976 and 1981 Resolutions nor the sufficiency or timeliness of the filings was questioned.

In November, 1987, the PFZ engineers resubmitted the preliminary project plans to ARPE. The next month, Jack Katz, a PFZ officer, attended a meeting with Mr. Amadeo Francis, Special Advisor to the Governor, to discuss the project. On December 28, 1987, PFZ filed its original complaint in the United States District Court for the District

of Puerto Rico, alleging that ARPE's continued refusal to process the drawings and issue the permits constituted a violation of PFZ's right to due process and amounted to a taking without just compensation under the United States Constitution.² Defendants filed an answer to the complaint and a motion to dismiss.

On August 2, 1988, ARPE informed PFZ by letter that the 1976 Planning Board Resolution and the 1981 ARPE Resolution were no longer in effect. PFZ requested reconsideration of the decision. ARPE denied the request. PFZ also petitioned for review of ARPE's decision in Superior Court. This petition, along with its petition for certiorari to the Supreme Court of Puerto Rico, were denied. PFZ filed its Amended Complaint in federal district court on October 11, 1988, alleging that ARPE's failure and continued refusal to process the construction drawings have deprived PFZ of its rights to procedural and substantive due process under the Fourteenth Amendment to the United States Constitution. PFZ also alleged that the treatment afforded its project differed substantially from the treatment of others similarly situated, thereby violating PFZ's right to equal protection under the Fourteenth Amendment.

The district court held that the post-deprivation process afforded to PFZ under Puerto Rico law was constitutionally adequate. It also held that, given the absence of any allegations of racial animus, political discrimination, or fundamental procedural irregularity, PFZ had failed to state a claim for violation of its rights to due process or equal protection under the Fourteenth Amendment. The district court therefore dismissed the complaint.

II.

A. Procedural Due Process

In order to establish a procedural due process claim under § 1983, PFZ must allege first that it has a property interest as defined by state law and, second, that the defendants, acting under color of state law, deprived it of that property interest without constitutionally adequate process. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). With respect to the first requirement, PFZ argues that, once the Planning Board gave its approval of PFZ's project in 1976 and once ARPE adopted a resolution approving the project in February, 1981,

² The takings claim was not pursued in PFZ's Amended Complaint, *infra*.

PFZ had acquired a legitimate claim of entitlement to approval of the construction drawings and to issuance of a building permit. Although we think it far from clear that PFZ's expectation of receiving a construction permit from ARPE constituted a property interest under Puerto Rico law, we may assume, *arguendo*, that the facts alleged in the complaint are sufficient to establish such an interest.

Assuming that PFZ had a property interest in obtaining the construction permit, it was deprived of that interest when ARPE refused to process the construction drawings. This deprivation was "under color of state law" for the purposes of § 1983. We turn, therefore, to the adequacy of the process afforded PFZ. Under Puerto Rico law, PFZ was entitled to request reconsideration of the decision by ARPE and, if reconsideration was denied, to file a petition for review of ARPE's action in the Superior Court of Puerto Rico.³ PFZ now argues that this post-deprivation remedy was inadequate — that PFZ was entitled to an administrative hearing before the denial by ARPE. We disagree.

PFZ does not contend that the project approval procedures established by Puerto Rico law and by ARPE's custom and practice violate the Due Process Clause of the federal Constitution. Rather, it alleges that ARPE illegally departed from Puerto Rico's prescribed procedures by failing to process the construction drawings. When a deprivation of property results from conduct of state officials violative of state law, the Supreme Court has held that failure to provide predeprivation process does not violate the Due Process Clause. *See Parratt v. Taylor*, 451 U.S. 527, 543 (1980). Indeed, it makes little sense to argue that ARPE had to afford the plaintiff a hearing before it illegally departed from its own procedures by refusing to process the construction drawings. The state is not required to anticipate such violations of its own constitutionally adequate procedures. To hold otherwise would convert every de-

³ 23 L.P.R.A. § 72 provides as follows:

Any party aggrieved by the action, decision or resolution of the Regulations and Permits Administration on housing development cases, in regard to which a petition for reconsideration was instituted before the Administration within the first thirty (30) days from the mailing of the notice of said action or decision and was denied by the latter, may file a petition for review before the . . . Superior Court of Puerto Rico.

parture from established administrative procedures into a violation of the Fourteenth Amendment, cognizable under § 1983. See *Creative Environments v. Estabrook*, 680 F.2d 822, 832 n.9 (stating that "where a state has provided reasonable remedies to rectify a legal error by a local administrative body . . . due process has been provided"), *cert. denied*, 459 U.S. 989 (1982).

As, therefore, a pre-deprivation hearing was not required to meet the demands of the Due Process Clause, the only question is whether the post-deprivation process available to PFZ was adequate. We hold that the combination of administrative and judicial remedies provided by Puerto Rico law is sufficient to meet the requirements of due process. Under Puerto Rico law, PFZ had the right to petition for reconsideration by ARPE and for review in the Superior Court. Although ARPE declined the request for reconsideration and the Superior Court denied the petition for review, PFZ had the opportunity to present its allegations of administrative error and misconduct before the relevant administrative and judicial bodies of the Commonwealth of Puerto Rico. That relief from the agency decision was denied does not affect the adequacy of the process provided. See *id.*

B. Substantive Due Process

In addition to its procedural due process claim, PFZ alleges that ARPE violated its rights to substantive due process when ARPE arbitrarily or capriciously refused to process its approved construction drawings. This Court has repeatedly held, however, that rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process. See, e.g., *Chongris v. Board of Appeals of Town of Andover*, 811 F.2d 36, 42-43 (1st Cir.), *cert. denied*, 483 U.S. 1021 (1987); *Chiplin Enterprises v. City of Lebanon*, 712 F.2d 1524, 1528 (1st Cir. 1983); *Creative Environments*, 680 F.2d at 829-30. Even where state officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation. See *Chiplin Enterprises*, 712 F.2d at 1528. The doctrine of substantive due process "does not protect individuals from all [governmental] actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents 'governmental power from being used for purposes of oppression,' or 'abuse of government power that shocks the conscience,' or 'action that is legally irrational in that it is not sufficiently

keyed to any legitimate state interest' " *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 943 (D.C. Cir. 1988) (citations omitted). See *Pittsley v. Werish*, No. 90-1372 (1st Cir. February 27, 1991); see also *Hoffman v. City of Warwick*, 909 F.2d 608, 618 (1st Cir. 1990) (applying a "rational basis" test to governmental action challenged under a substantive due process theory). PFZ's allegations concerning ARPE's treatment of its proposal simply do not make out a substantive due process violation under this standard.

PFZ's substantive due process claim is similar to a developer's claim rejected by this Court in *Chiplin Enterprises*. There the planning board, after granting preliminary approval to a development project, denied a building permit for the project. The developer filed suit in state court and successfully challenged the authority of the planning board to review the site plans. After obtaining the permit, the developer brought a § 1983 action in federal court alleging a violation of his substantive due process rights. This court rejected the claim, stating that "[a] mere bad faith refusal to follow state law in such local administrative matters simply does not amount to a deprivation of due process where the state courts are available to correct error." 712 F.2d at 1528.

We rejected another such claim in *Creative Environments v. Estabrook*. (T)here the planning board had refused to approve a developer's project based on its fear of the social and political effects the development might have on the community. Rejecting the developer's due process claim, the court explained that "property is not denied without due process simply because a local planning board rejects a proposed development for erroneous reasons or makes demands which arguably exceed its authority under the relevant state statutes." 680 F.2d at 832 n.9.

Consistent with the above, we hold that PFZ's allegations that ARPE officials failed to comply with agency regulations or practices in the review and approval process for the construction drawings are not sufficient to support a substantive due process claim under the Fourteenth Amendment to the United States Constitution. See *Amsden v. Moran*, 904 F.2d 748, 757 (1st Cir. 1990) (noting that "even bad faith violations of state law are not necessarily tantamount to unconstitutional deprivations of due process"), *cert. denied*, ___ U.S. ___, 111 S. Ct. 713 (1991). Even assuming that ARPE engaged in delaying tactics and refused to issue permits for the Vacía Talega project based on con-

siderations outside the scope of its jurisdiction under Puerto Rico law, such practices, without more, do not rise to the level of violations of the federal constitution under a substantive due process label.

C. Equal Protection

PFZ's equal protection claim represents, in effect, recharacterization of its substantive due process claim. PFZ argues that ARPE's refusal to process the construction drawings "differ[ed] invidiously from the process and treatment accorded to drawings and plans of others similarly situated." In *Creative Environments*, we suggested in a footnote that an equal protection claim "may be presented in situations involving gross abuse of power, invidious discrimination or fundamentally unfair procedures." 680 F.2d at 832 n.9. PFZ, however, alleges no facts that would suggest discrimination based on an invidious classification such as race or sex, nor does it allege the type of egregious procedural irregularities or abuse of power mentioned by *Creative Environments* as conceivably rising to the level of a federal equal protection violation. Alleging only that ARPE treated its project differently from others under consideration, PFZ's equal protection claim represents nothing more than a claim that ARPE departed from its own procedures or those provided by Puerto Rico Law.

Again, we emphasize that, whether under a due process or equal protection theory, departures from administrative procedures established under state law or the denial of a permit based on reasons illegitimate under state law, do not normally amount to a violation of the developer's federal constitutional rights. As we stated in *Creative Environments*,

[e]very appeal by a disappointed developer from an adverse ruling by a local . . . planning board necessarily involves some claim that the board exceeded, abused or "distorted" its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough simply to give these state law claims constitutional labels such as "due process" or "equal protection" in order to raise a substantial federal question under section 1983.

680 F.2d at 833. Absent allegations reflective of more fundamental discrimination, we agree with the district court that PFZ did not state a claim under the Equal Protection Clause of the Fourteenth Amendment.

III.

Accepting the factual allegations of the complaint as true and construing them in the light most favorable to plaintiff, we hold that the plaintiff did not state a federal claim.

Affirmed. Costs to appellees.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1723

PFZ PROPERTIES, INC.
Plaintiff, Appellant,
v.
RENE ALBERTO RODRIGUEZ, ETC., ET AL.,
Defendants, Appellees

JUDGEMENT

Entered: March 18, 1991

This cause came on to be heard on appeal from the United States District Court for the of Puerto Rico, and was argued by counsel.

Upon consideration whereroof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

FRANCIS P. SCIGILIANO

Clerk.

[cc: Mr. Richichi and Ms. Ramirez]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1723

PFZ PROPERTIES, INC.,
Plaintiff, Appellant,
v.
RENE ALBERTO RODRIGUEZ, ETC., AL.,
Defendants, Appellees.

BEFORE

Campbell and Cyr, Circuit Judges,
and Fuste,* District Judge.

ORDER OF COURT

Entered: April 23, 1991

In its Petition for Rehearing, appellant PFZ Properties, Inc. argues that rehearing is warranted because the panel limited its consideration to the allegations contained in the amended complaint and did not take into account the additional factual allegations contained in the pretrial order. We note, however, that PFZ did not raise any such argument in its brief. Indeed, it argued that the district court *erred* in taking into consideration facts outside the pleadings (but contained in the pretrial order) in applying a motion to dismiss standard. Having failed to raise it in its brief, PFZ may not rely upon the argument in support of its petition for rehearing. See *e.g.*, *United States v. Ferryman*, 897 F.2d 591 (1st Cir. 1990) (issue raised for the first time in petition for rehearing dismissed as not properly before the court); *Arajuo v. Woods Hole*, 693 F. 2d 1, 4 (1st Cir. 1982) (refusing to consider theory raised for the first time in petition for rehearing).

We note also that, in our review under 12(b) (6), we indulged all inferences in favor of PFZ, the nonmovant. For example, we assumed that ARPE had violated its own rules, that its procedures were irregular, and even that it had singled out PFZ for differential treatment. None of

the additional factual allegations in the pretrial statement add significantly to the facts taken as true in our opinion. thus, even if PFZ had raised the argument in a timely manner, the outcome of the case would not have been different.

The petition for rehearing is denied.

By the Court:

FRANCIS P. SCIGILIANO

Clerk.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.,

Plaintiff,

v.

RENE A. RODRIGUEZ, et al.,

Defendants.

CIVIL NO. 87-1915 HL

OPINION AND ORDER

This case concerns a dispute over a residential and tourist development project in an area known as Vacía Talega in Loíza, Puerto Rico. Plaintiff PFZ Properties, Inc. ("PFZ") brought the present action claiming that the Puerto Rico Regulations and Permits Administration (hereinafter called by its Spanish acronym "ARPE") and its former administrator, Rene Alberto Rodriguez¹, deliberately delayed and failed to process certain construction drawings for site improvements submitted by PFZ to ARPE in February 1982. PFZ brings this action under the Civil Rights Statute, 42 U.S.C. Section 1983, alleging that defendants have violated its procedural and substantive due process rights and equal protection of the laws. Defendants move to dismiss this action on various grounds. As a result of our conclusion, we only address the issue of whether PFZ has stated a cause of action under Section 1983.²

¹ Codefendant Rodriguez was the Acting Administrator of the Regulations and Permits Administration from March 1, 1987 until he was appointed Administrator on September 2, 1987. He held the position of Administrator until February 20, 1989. At the time of this lawsuit was filed, Rodriguez was the Administrator of ARPE. Since Rodriguez is no longer at ARPE, he has been replaced by Salvador Arana as the current Administrator of ARPE. Pursuant to Federal Rule of Civil Procedure 25(d), Salvador Arana automatically shall be substituted as a party in his official capacity as Administrator of ARPE. However, Rodriguez shall remain as a defendant in his individual capacity.

² Defendants also contend in their motion to dismiss that the action is time barred and that the Eleventh Amendment immunity bars this action. We find that these arguments are without merit and they will not be addressed. Thus, the Court only addresses the issue of whether PFZ has stated a cause of action. Since the Court concludes that PFZ does not have a cause of action under Section 1983, the issue of qualified immunity raised in defendants' motion for summary judgment need not be discussed. Likewise, there is no need to rule on the executive privilege raised by defendants when PFZ sought to depose two Governor's aides. See Motion to Alter or Amend Order and Request for Stay of Proceedings, and plaintiff's Opposition, Docket numbers 61 and 63.

*Of the District of Puerto Rico, sitting by designation.

I. FACTS

In deciding defendants' motion to dismiss, the Court accepts the allegations in the amended complaint as true and views them in the light most favorable to plaintiff PFZ. *SCHEUER v. RHODES*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974); *MORALES BORRERO v. LOPEZ FELICIANO*, 710 F. Supp. 32, 33 (D.P.R. 1989).

Since 1960, PFZ owns 1,358.65 "cuerdas"³ in Vacía Talega. Some years after its purchase of the land, PFZ applied to the Puerto Rico Planning Board⁴ to develop the land into a 4,000-unit residential and tourist complex. Following extensive review and hearings, the Planning Board finally approved PFZ's project on May 14, 1976 ("the 1976 Planning Board Resolution").⁵

On August 24, 1978, PFZ timely submitted to ARPE plans for the internal preliminary development of blocks for the first section of the project, as required by the 1976 Planning Board Resolution. On February 24, 1981, ARPE approved the plans for the first section ("the 1981 ARPE Resolution").

On February 22, 1982, PFZ timely submitted to ARPE construction drawings for site improvements for the subdivision works of block 2 of

³ A "cuerda" is a Spanish measure equivalent to 0.97 acre. VELAZQUEZ, *Diccionario de los Idiomas Ingles y Español* 193 (1973); *CULEBRAS ENTERPRISES CORP. v. RIVERA RIOS*, 813 F.2d 506, 508 (1st Cir. 1987).

⁴ The Puerto Rico Planning Board was created for the general purpose of "guiding the integral development of Puerto Rico" that will best promote the general welfare of the present and future inhabitants. The Planning Board is responsible for setting policies in the areas of development, distribution of population, use of the land and other natural conditions in Puerto Rico. 23 L.P.R.A. sec. 62c.

⁵ The 1976 Planning Board Resolution approved the development project in two phases. The first section would create 2,000 hotel rooms and 2,000 residential units on 106 cuerdas. The second section would develop 6,600 hotel rooms and 6,135 residential units on 266.41 cuerdas.

The Puerto Rico Superior Court upheld the 1976 Planning Board Resolution against a petition filed by local residents requesting reconsideration of the 1976 Planning Board Resolution on the ground that the Planning Board did not adequately consider the development's impact on the environment and the residents living in the area. The Puerto Rico Supreme Court declined to exercise appellate jurisdiction over the resident's appeal on January 4, 1978.

the first section ("the construction drawings"), as required by the 1976 Planning Board Resolution and the 1981 ARPE Resolution⁶. The construction drawings were accompanied by a letter from the firm of engineers, architects and planners engaged by PFZ to develop Vacía Talega. The letter informed ARPE that it was impossible for PFZ to present the final construction plans for the off-site works because the endorsements of Aqueduct and Sewer Authority and the Electric Energy Authority were not received until November 3, 1981 and January 14, 1982, respectively.

In order to facilitate the processing of the project, PFZ also submitted the preliminary project plans for the structures to be constructed in block 2 of the first section ("the preliminary project plans") for ARPE's comments which were not required at that stage of the agency process. However, ARPE returned the preliminary project plans because they were premature and not in compliance with the 1981 ARPE Resolution, which established that the construction drawings for site improvements be processed first. ARPE also informed PFZ that it had sent the construction drawings to its Regional Office in Carolina, Puerto Rico.

On January 27, 1986, the PFZ engineers wrote to ARPE to inquire about the status of the construction drawings. On February 19, 1986 and September 9, 1986, ARPE held meetings to discuss the project with other Commonwealth agencies. PFZ and its engineers attended the September 9th meeting. At the meeting no one directly or indirectly questioned the validity and effectiveness of the 1976 Planning Board Resolution or the 1981 ARPE Resolution nor the timeliness of the filing of PFZ's construction drawings.

Sometime between the first and second ARPE meetings, two senators had proposed a bill to incorporate the Vacía Talega area as part of the Commonwealth forest system. The bill proposed to conserve for

⁶ ARPE "shall issue the corresponding permit based on the compliance with the regulation provided in section 42a of this title and in the certificate submitted by said engineer or architect, and shall file a copy of said permit together with the plans and other documents, required in accordance with the regulation provided in sections 42a-42h of this title." 23 L.P.R.A. sec. 42c. It shall also have the powers "to investigate all matters relative to the transaction or granting of said permit ... and may take such administrative or judicial action as may correspond." *Id.*

scientific, ecological and passive recreation purposes the Vacia Talega area, an area known for its mangrove-rich lands.

On February 26, 1987, the former administrator of ARPE, Lionel Matta-Garcia, wrote to PFZ's engineers informing them that because a considerable length of time had lapsed from the original approval of the project (October, 1970), it was necessary to receive updated comments from the government agencies. The letter also stated that it considered the construction plans as preliminary because they lacked basic details about the urbanization works to serve the project. The letter granted PFZ a year from the date of the letter to submit final construction plans. Matta-Garcia warned PFZ that if this deadline was not complied with, then the project would be dismissed.

PFZ claims it never received this letter of February 26, 1987. PFZ points out that the letter was signed by Matta-Garcia two days before he retired and that his subordinate and incoming administrator, codefendant Rodriguez, did not forward the letter but had the letter filed in a secret file involving the Vacia Talega project.

On October 8, 1987, the PFZ engineers again wrote to ARPE requesting information regarding the processing of the project. ARPE never answered this letter.

In November and December of 1987, the local newspapers reported that sponsors of the bill to make Vacia Talega area a forest reserve, called on the Governor of Puerto Rico to freeze the PFZ project until the House could vote on the approved Senate bill. The newspapers also reported that the Governor was reevaluating public policy on the environmentally sensitive coastal area of Vacia Talega and that no permit decision would be made until a new public policy could be determined.

On November 27, 1987, PFZ's engineers resubmitted the returned preliminary project plans to ARPE. After a PFZ officer attended a December 9, 1987 meeting with the Special Advisor of the Governor to discuss the project, PFZ filed on December 28, 1987 this action.

On August 2, 1988, ARPE sent two letters to PFZ's engineers, one from the Assistant Administrator of ARPE's Area of Regional Opera-

tions and the other from Assistant Administrator in charge of ARPE's Program of Technical Revisions. In these two letters, PFZ was informed that the 1976 Planning Board Resolution and the 1981 ARPE Resolution were no longer in effect because the preliminary project plans were not considered advanced plans. ARPE returned the preliminary project plans but the construction drawings were neither returned nor referred to in the letter. On August 17, 1988, PFZ's engineers immediately wrote a letter to ARPE requesting reconsideration of the decision and unequivocally informing ARPE that it had reviewed the wrong drawings. Two sets of drawings were submitted by PFZ--the construction drawings and the preliminary project plans. The latter were sent to aid ARPE technicians in their review of the construction drawings. ARPE, nevertheless, denied PFZ's request for reconsideration.

PFZ then requested review of the agency's decision before the Puerto Rico Superior Court. The Superior Court affirmed the ARPE's decision and PFZ sought further review before the Puerto Rico Supreme Court. The Supreme Court denied review.

PFZ alleges that ARPE deliberately delayed processing of the construction drawings and illegally refused to process construction drawings pursuant to Puerto Rico law, ARPE's regulations and practices. PFZ claims that defendants' deliberate actions have deprived PFZ of its constitutional rights to procedural and substantive due process and equal protection. PFZ seeks damages and a permanent injunction prohibiting defendants from refusing to process the construction drawings and the preliminary project plans and ordering defendants that the construction drawings and the preliminary project plans be processed. Defendants move to dismiss on the ground that the complaint fails to state a claim under Section 1983. For the reasons below, we grant the motion to dismiss.

II. PROCEDURAL DUE PROCESS

To establish a claim for deprivation of procedural due process under Section 1983, PFZ must allege that 1) it has a property interest and 2) defendants, acting under color of law, deprived plaintiff of that property interest without constitutionally adequate procedural process. *LOGAN v. ZIMMERMAN BRUSH CO.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265, 273 (1982). See *CLEVELAND BD. OF*

EDUCATION v. LOUDERMILL, 470 U.S. 532, 541, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494, 503 (1985); BOARD OF REGENTS v. ROTH, 408 U.S. 564, 569-70, 92 S. Ct. 2701, 2705, 33 L.Ed.2d 548, 556-57 (1972).

Defendants argue that PFZ has failed to satisfy the first prong because PFZ cannot claim a property interest in a construction permit it has not yet received. Defendants contend that procedural due process is afforded only to persons who are enjoying a government benefit. Defendants contend that PFZ's application for a construction permit does not create a property interest in obtaining a construction permit and therefore they are not entitled to any type of process. PFZ claims, however, that it is reasonable to conclude that once it received the Planning Board's approval of its project in 1976 and ARPE's issuance of a formal resolution in 1981 that it had legitimate claim of entitlement to the government's approval of the construction drawings. Assuming that PFZ acquired a property interest in obtaining a construction permit for its project, PFZ does not show that it was deprived of adequate process.

The key issue in procedural due process was whether there was adequate process. Puerto Rico law afforded PFZ review of ARPE's denial to review PFZ's construction drawings. 23 L.P.R.A. sec. 72d⁷.

⁷23 L.P.R.A. sec. 72d provides that:

Any party aggrieved by the action, decision or resolution of the Regulations and Permits Administration on housing development cases, in regard to which a petition for reconsideration was instituted before the Administration within the first thirty (30) days from the mailing of the notice of said action or decision and was denied by the latter, may file a petition for review before the San Juan Part of the Superior Court of Puerto Rico or any Part whose jurisdiction comprises the place where the project is located, within the term of thirty (30) days reckoning from the mailing date of the notice of denial of the petition for reconsideration.

Once the petition for review is established, if the writ is issued, it shall be the duty of the Regulations and Permit Administration to remand to the court the record of the case within fifteen (15) calendar days following the issuance of the writ.

The review before the Superior Court shall be limited exclusively to issues of law.

The law provides for both agency and judicial review. PFZ had available the procedural remedy of requesting reconsideration of ARPE's denial to review PFZ's construction drawings. PFZ exercised that remedy in its letter of August 17, 1988. Although ARPE denied PFZ's request for reconsideration, the mere denial does not mean that PFZ was not afforded a remedy. PFZ also appealed ARPE's denial to the Puerto Rico Superior Court and the Superior Court affirmed the agency's decision. PFZ sought further review before the Puerto Rico Supreme Court and the Supreme Court denied review. Because PFZ had available both administrative and judicial remedies, which PFZ exercised, we cannot conclude that PFZ was deprived of a meaningful opportunity to be heard in violation of due process. See BELLO v. WALKER, 840 F.2d 1124, 1128 (3rd Cir. 1988); CREATIVE ENVIRONMENTS, INC. v. ESTABROOK, 680 F.2d 822, 829-30 (1st Cir. 1982). See also ROGERS v. OKIN, 738 F.2d 1 (1st Cir. 1984); ROY v. CITY OF AUGUSTA, 712 F.2d 1517 (1st Cir. 1983).

PFZ claims that it was entitled to have ARPE review the construction drawings and make comments. PFZ argues that if the construction drawings did not comport with the regulations then according to ARPE'S custom and practice, ARPE had to inform proponent of the project and give the proponent an opportunity to make changes. Although ARPE may not have afforded PFZ with the opportunity to make changes before the construction drawings were rejected pursuant to ARPE's custom and practice, the mere refusal to follow state law or agency custom does not give rise to a federal violation. In ROY, the court emphasized that where state courts are available to correct errors, "the mere fact the individual defendants may have refused to renew (plaintiff's) permit for reasons untenable under Maine law gives rise to no federal right". 712 F.2d at 1523. See also CHIPLIN ENTERPRISES, INC. v. CITY OF LEBANON, 712 F.2d 1524, 1526 (1st Cir. 1983) (a mere bad faith refusal does not constitute a due process violation where judicial review is available to correct the error). Like the plaintiff in ROY, PFZ received minimal due process in the form of reconsideration before the agency and appeal before the local courts. *Id.*

III. SUBSTANTIVE DUE PROCESS

The First Circuit has repeatedly found that controversies surrounding rejections of proposed land development projects and denials of permits does not amount to a federal constitutional violation. See

CHAMPLIN ENTERPRISES INC. v. CITY OF LEBANON, 712 F.2d 1524 (1st Cir. 1983); ROY v. CITY OF AUGUSTA, 712 F.2d 1517 (1st Cir. 1983); CREATIVE ENVIRONMENTS, INC. v. ESTABROOK, 680 F.2d 822 (1st Cir. 1982). The Court has also held that even where state officials have clearly violated state law in the area of land planning or zoning, this action does not rise to the level of a constitutional deprivation. In order to establish a substantive due process claim involving a dispute between a developer and a state agency, the developer must show that there was racial animus, political discrimination, or fundamental procedural irregularity in the processing of the projects. CHAMPLIN ENTERPRISES, 712 F.2d at 1528; ROY, 712 F.2d at 1523; CREATIVE ENVIRONMENTS, 680 F.2d at 833. See RASKIEWICZ v. TOWN OF NEW BOSTON, 754 F.2d 38, 44 (1st Cir. 1985) ("federal courts do not sit as a super zoning board or a zoning board of appeals"); STEEL HILL DEVELOPMENT v. TOWN OF SANBORTON, 469 F.2d 956, 960 (1st Cir. 1972) ("a court does not sit as a super zoning board with power to act *de novo*, but rather has, in the absence of alleged racial or economic discrimination..., a limited role of review").

PFZ alleges that ARPE violated its rights under substantive due process when ARPE arbitrarily, capriciously or illegally delayed and denied review of the construction drawings. PFZ further alleges that the handling of its project was tainted with fundamental procedural irregularities. PFZ specifically claims that defendants disregarded and concealed from PFZ the ARPE letter of February 1987. This letter was written by Matta-Garcia, the former administrator of ARPE, informing that its construction plans were considered preliminary and granting PFZ one year from the date of the letter to submit the final construction plans for the urbanization works. PFZ also claims that defendants conducted a sham review of the construction drawings.

PFZ's claim is more similar to the claim rejected in CREATIVE ENVIRONMENTS, INC. v. ESTABROOK, 680 F.2d 822 (1st Cir. 1981), *cert. denied*, 459 U.S. 989, 103 S.Ct. 345, 74 L.Ed.2d 385 (3rd Cir. 1982). In CREATIVE ENVIRONMENTS, INC., a real estate developer claimed that its residential housing development project was improperly rejected by the local planning board. The planning board rejected the project because it feared the social effects the development

may have on the community and the voter influence the incoming homeowners' association may pose. The developer argued that the planning board engaged in misapplication of state law. The first Circuit stated that "property is not denied without due process simply because a local planning board rejects a proposed development for erroneous reasons or makes demands which arguably exceed its authority under the relevant state statutes." *Id.* at 832 n.9. The Court also stated that:

(e)very appeal by a disappointed developer from an adverse ruling by a local...planning board necessarily involves some claim that the board exceeded, abused or "distorted" its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough simply to give these state law claims constitutional labels such as "due process" or "equal protection" in order to raise a substantial federal question under section 1983. As has been often stated, 'the violation of a state statute does automatically give rise to a violation of rights secured by the Constitution.' (citation omitted).

Id. at 833

The First circuit reemphasized these principles in CHAMPLIN ENTERPRISES, INC. v. CITY OF LEBANON, 712 F.2d 1524 (1st Cir. 1983) and in ROY v. CITY OF AUGUSTA, 712 F.2d 1517 (1st Cir. 1983). In CHAMPLIN ENTERPRISES, the planning board had granted preliminary approval of a project but later denied a building permit for the project. The developer filed suit in state court and successfully obtained a permit on the ground that the planning board had no authority to review site plans for "multi-family dwelling units." The developer then filed a Section 1983 action alleging damages for the five-year delay in obtaining the permit. The First Circuit found that "(a) mere bad faith refusal to follow state law in such local administrative matters simply does not amount to a deprivation of due process where the state courts are available to correct error." *Id.* R 1528

In ROY, the court held that plaintiff has stated a constitutional claim when he had been denied a renewal of his pool hall license because

defendants had allegedly disregarded a state court order requiring the issuance of the license. The Court stated that if the case had involved a denial of a license based on improper reasons, such a claim would not have constituted a constitutional violation. 712 F.2d at 1523.

Based on First Circuit precedent, PFZ's allegations that ARPE officials have deliberately failed to comply with its own agency regulations or practices in the review of PFZ's construction drawings are not enough to state substantive due process claim because claims of outright violations of state law or regulations in the area of land planning or zoning are not considered constitutional violations. Similar to this case, in *CLOUTIER v. TOWN OF EPPING*, 714 F.2d 1184 (1st Cir. 1983), the plaintiff alleged various unlawful action such "abuse of process, perjury, failing to come forward with material evidence, and giving false information to a state agency about the plaintiffs". *Id.* at 1189. Nevertheless, said action was not considered egregious behavior to amount to a constitutional violation under due process.

PFZ also alleges that the review of the project has been tainted with fundamental procedural irregularities. PFZ claims that once ARPE issued the 1976 Resolution, approving PFZ's preliminary development plans for the first section, ARPE had neither the authority nor the discretion to refuse to review PFZ's construction drawings, but rather ARPE was only required to make a technical review of the construction drawings. If the construction drawings did not meet the technical requirements, ARPE would inform the developer so that the developer could make the necessary revisions. After this "back and forth" process is completed and the construction drawings are in compliance with ARPE's resolution and regulations, ARPE must issue a construction permit.

We recognize that ARPE may have engaged in delaying tactics and may have intentionally denied the Vacia Talega project. However, it is not our place to adjudicate these claims. Federal courts cannot review disagreements a developer has with the handling of its project by an agency even though agency has engaged in delays and intentional violations. *CHIPLIN ENTERPRISES*, 712 F.2d at 1528; *ROY*, 712 F.2d at 1523; *CREATIVE ENVIRONMENTS*, 680 F.2d at 833. However, developers are not left without a remedy because state courts are available to redress any wrongs committed by state planning agencies. It must be emphasized that this is a type of dispute which con-

cerns local interest (i.e. environment and development of the island). PFZ may have a claim under local law which it can pursue in that forum. *See CREATIVE ENVIRONMENTS*, 680 F.2d at 833; *ROY*, 712 F.2d at 1523.

IV. EQUAL PROTECTION

Many of the arguments made by PFZ under substantive due process are the same for its equal protection claim. PFZ's principle argument is that ARPE engaged in "illegal political considerations." In support of this contention, PFZ relies on the First Circuit case of *CORDECO DEVELOPMENT CORP. v. SANTIAGO VAZQUEZ*, 539 F.2d 256 (1st Cir. 1976), *cert. denied*, 429 U.S. 978, 97 S.Ct 488, 50 L.Ed.2d 586 (1976). However, we find that this case is inapposite. *CORDECO* involved a litigant who alleged that government officials acted maliciously and with illegitimate "political" or personal motives in delaying and denying a permit to extract sand. The circuit court affirmed the trial court's ruling that defendants denied the permit in order to favor plaintiff's competitor who was a family with close political ties to the incumbent administration. In that case, there was a constitutional violation because officials had adversely treated a particular permit applicant due to partisan political considerations, even though the purposeful discrimination was not based on invidious classification.

On the contrary, PFZ has not alleged facts that defendants have succumbed to political pressure from a rival developer. Nor does PFZ allege that the reason for the defendants' action was a result of partisan politics.⁸ This case also does not involve discrimination based on invidious classification (i.e. race or religion); this is not a case where PFZ was singled out for disparate treatment anent other similarly situated developers. *See LECLAIR v. SAUNDERS*, 627 F.2d 606 (2d Cir. 1980). The Governor's remarks in the press that his views on the development of Vacia Talega had changed and that he now plans to preserve the area in its natural state, cannot be characterized as imper-

⁸ PFZ's Counsel was asked, at the Pretrial Conference, whether it was claiming that denial of permit was because it supported a rival political party. PFZ's counsel responded that was not the case. *See Transcript of Pretrial and Settlement Conference of December 8, 1989.*

missible, even if made with a view to appease voters, rather than for truly environmental reasons. We note that under Puerto Rico law, the Governor of Puerto Rico has the authority to revoke development policies created by the Planning Board. 23 L.P.R.A. sec. 62j(6). Consequently, PFZ has failed to state a cause of action for violation of equal protection of the laws.

WHEREFORE, for the foregoing reasons, defendants' motion to dismiss is hereby **GRANTED**.

IT IS SO ORDERED.

San Juan, Puerto Rico, March 9, 1990.

HECTOR M. LAFFITTE
U.S. District Judge.

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO**

PFZ PROPERTIES, INC.,

Plaintiff,

v.

RENE A. RODRIGUEZ, et al.,

Defendants.

CIVIL NO. 87-1915 HL

-----X

JUDGMENT

The Court having entered an Opinion and Order granting defendants' Motion to Dismiss on this same date, it is hereby **ORDERED AND ADJUDGED** that this case be **dismissed**.

San Juan, Puerto Rico, March 9, 1990.

HECTOR M. LAFFITTE
U.S. District Judge

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO**

PFZ PROPERTIES, INC.

Plaintiff,

v.

RENE ALBERTO RODRIGUEZ, et al.,

Defendants.

CIVIL NO. 87-1915 HL

-----X

ORDER

Plaintiff moves the Court to reconsider its March 9, 1990 opinion and order granting defendants' motion to dismiss and dismissing plaintiff's complaint. Defendants have not opposed this motion. Because plaintiff's motion for reconsideration is basically a rehash of the arguments raised in its lengthy oppositions to defendants' motion to dismiss and motion for summary judgment, the Court addresses only plaintiff's first and last grounds for reconsideration.

As to plaintiff's first point for reconsideration, plaintiff contends that this Court erred in concluding that plaintiff was not deprived of a meaningful opportunity to be heard in violation of due process because plaintiff had available both administrative and judicial remedies. Plaintiff asserts that the availability of state administrative and court remedies does not bar due process claims under 42 U.S.C. section 1983. Plaintiff refers to *MILLER v. TOWN OF HULL*, 878 F.2d 523, 529 (1st Cir. 1989) to support this argument. The Court was fully aware of the *MILLER* case when defendants' dispositive motions were under advisement but nevertheless concluded then that the *MILLER* opinion had no bearing on this case. In *MILLER*, the First Circuit rejected the argument that exhaustion of state remedies is required in order to state a Section 1983 claim. Our opinion and order did not state or infer that plaintiff had to exhaust their local remedies as a prerequisite in alleging a Section 1983 cause of action. Plaintiff's due process was dismissed on the merits because Puerto Rico law provided adequate process by affording plaintiff various reviews of defendants' administrative decisions. As such, the *MILLER* case does not alter our position on plaintiff's due process claim.

Plaintiff's last point for reconsideration is that this Court should have allowed it to take the depositions of two Governor's aides before rendering a decision on the merits of its case. We disagree. We do not think that the depositions of these aides would have impacted on the results of this case. Moreover, in deciding the motion to dismiss, plaintiff's allegations in the complaint were accepted as true and every inference was read in the light most favorable to plaintiff. See Opinion and Order of March 9, 1990 at 2.

WHEREFORE, plaintiff's motion for reconsideration or in the alternative for stay of judgment is hereby **DENIED**.

IT IS SO ORDERED.

San Juan, Puerto Rico, June 15, 1990

HECTOR M. LAFFITTE
U.S. District Judge.

23 L.P.R.A. sec. 72d

Any party aggrieved by the action, decision or resolution of the Regulations and Permits Administration on housing development cases, in regard to which a petition for reconsideration was instituted before the Administration within the first thirty (30) days from the mailing of the notice of said action or decision and was denied by the latter, may file a petition for review before the San Juan Part of the Superior Court of Puerto Rico or any Part whose jurisdiction comprises the place where the project is located, within the term of thirty (30) days reckoning from the mailing date of the notice of denial of the petition for reconsideration.

Once the petition for review is established, if the writ is issued, it shall be the duty of the Regulations and Permit Administration to remand to the court the record of the case within fifteen (15) calendar days following the issuance of the writ.

The review before the Superior Court shall be limited exclusively to issues of law.

OCT 17 1991

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(2)
No. 91-122

**In the
Supreme Court of the United States**

OCTOBER TERM, 1991

PFZ PROPERTIES, INC.,
PETITIONER,

v.

RENE ALBERTO RODRIGUEZ, ET AL.,
RESPONDENTS.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Statement of the Case	1
Reasons for Denying the Petition	17
<i>As Regards The First Question Presented In The Petition:</i>	
I. The Court Need Not Review This Question, Because Under Puerto Rico Planning Laws, Regulations And ARPE Practice And Procedures Petitioner Did Not Have A Constitutionally Protected Property Interest In Receiving A Construction Permit.	17
II. Assuming <i>Arguendo</i> The Existence Of A Constitutionally Protected Property Interest, <i>Zinermon v. Burch</i> Is Distinguishable And Inapposite Because ARPE's Manual Of Practice And Procedure Does Not Charge Respondents With A Duty To Implement Procedural Safeguards Before ARPE Issues Decisions Dismissing Projects.	22
<i>As Regards The Second Question Presented In The Petition:</i>	
III. The Second Question In The Petition Is Not Properly Presented By The Facts Of This Case, And The Court Has No Occasion To Consider The Alleged Split Of Authority In The Circuits	25
Conclusion	28

(ii)

TABLE OF AUTHORITIES

	Page
<i>Amsden v. Moran</i> , 904 F.2d 748, 754 (1st Cir. 1990), cert. denied, 111 S.Ct. 713 (1991)	26
<i>Bishop v. Wood</i> , 426 U.S. 341, 344 (1976)	18
<i>Board of Regents v. Roth</i> , 408 U.S. 564 (1972)	18, 21
<i>Chongris v. Bd. of Appeals</i> , 811 F.2d 36 (1st Cir.), cert. denied, 483 U.S. 1201 (1987)	27
<i>Cleveland Bd. of Education v. Loudermill</i> , 478 U.S. 532 (1985)	18
<i>Easter House v. Felder</i> , 910 F.2d 1387 (7th Cir.) cert. denied, 111 S.Ct. 783 (1991)	24
<i>Goss v. Lopez</i> , 419 U.S. 565, 573-74 (1975)	18
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422, (1982) ..	14
<i>Mathews v. Elridge</i> , 424 U.S. 319 (1976)	15
<i>Memphis Light, Gas & Water Div. v. Craft</i> , 436 U.S. 1, 11-12 (1978)	18, 24
<i>Moore v. East Cleveland</i> , 431 U.S. 494, 502 (1977) (plurality opinion, Powell, J)	26
<i>PFZ Properties, Inc. v. Rodriguez</i> , 928 F.2d 28 (1st Cir. 1991)	1
<i>Rochin v. California</i> , 342 U.S. 165 (1952)	25, 27
<i>Zinermon v. Burch</i> , 494 U.S. —, 110 S.Ct. 975, 108 L.Ed. 2d 100 (1990)	22, 23, 24

STATUTES AND RULES

Fed. R. Civ. P. Rule 12 (b) (6)	10
Puerto Rico Laws Ann. tit. 23 §§ 62a, 62d, 62f	3
Puerto Rico Laws Ann. tit. 23 § 72d	12, 16, 22

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-122

PFZ PROPERTIES, INC.,
PETITIONER,

v.

RENE ALBERTO RODRIGUEZ, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Rene Alberto Rodriguez, the Regulations and Permits Administration of the Commonwealth of Puerto Rico and Salvador Arana respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the First Circuit's opinion in this case. The opinion is reported at 928 F.2d 28 (1991).

STATEMENT OF THE CASE

Introduction

This case concerns a dispute over a project to develop some 80 acres of land owned by petitioner PFZ Properties, Inc. in an area known as Vacía Talega, east of San Juan. Petitioner has both misstated and overlooked vital facts in the record of this case; and were the Court to grant the Petition it would face a case far different from the one sketched out by petitioner. Respondents are unable to accept the statement of the case which petitioner proffers to the Court and are, therefore, compelled to bring to the Court's attention those facts that evince that this case is far more complex than indicated by petitioner.

The Peculiar Framework of The Dispute

Petitioner PFZ Properties, Inc. is a corporation chartered under the laws of the Commonwealth of Puerto Rico and doing business in Puerto Rico for over three decades as a land developer. In 1976, the Puerto Rico Planning Board approved petitioner's preliminary development plan to build the first phase of a tourist hotel and residential complex ("the project") in a portion of a parcel of land owned by petitioner in Vacía Talega. Much of Vacía Talega is made up of the largest mangrove forest system in Puerto Rico.

Before the project was approved it raised the concern that acres of mangrove forest would be sacrificed inflicting substantial harm on this environmentally sensitive coastal area. The project generated considerable opposition, particularly from federal agencies and area residents. As petitioner concedes, the project was then, and remains today, a source of much controversy. Governor Rafael Hernandez-Colon, then serving his first term in office, backed the project in 1976. The

project was hailed chiefly for its potentially beneficial impact on Puerto Rico's tourism industry, and after public hearings and review of then extant policy guidelines on land use in Vacía Talega the Planning Board approved it.

The Planning Board reviews land use policy for the Governor at the highest executive level: the statute creating the Board makes it an "arm" of the Governor and attaches it to the Office of the Governor. The Governor appoints its members with the advice and consent of the Senate and also designates its Chairman.¹ On November 13, 1987, Governor Hernandez-Colon, now serving his second term in office, announced that his administration would review policy guidelines on land use in Vacía Talega, in response to a bill approved by the Senate in 1986 that would preserve Vacía Talega in its natural state and would allocate funds to acquire petitioner's parcel in Vacía Talega in a condemnation proceeding.

Although the Planning Board had approved development of the first phase of the project in 1976, by November 1987 petitioner had yet to do any work on the project.

A Project Not Pursued In Time To Escape Revisiting

The Planning Board's 1976 resolution approving the project authorized petitioner to prepare construction drawings for the subdivision works of the first section of the project "in compliance with the conditions and requirements established by this Board and other government agencies involved." One of the conditions for approval required petitioner "to obtain the permits required by law or by regulation." The Board's resolution advised petitioner that this resolution approving the prelimi-

¹ P.R. Laws Ann. tit 23 §§ 62a, 62d, 62f. The Board was created for the general purpose of guiding the integrated development of Puerto Rico and to set policies in the areas of development, distribution of population, use of the land and other natural conditions in Puerto Rico. See Sec. 62c.

nary development plan would be in force for a period of one year, and if final construction drawings were not submitted before the resolution expired the case would be "dismissed and filed for all legal purposes." The final construction drawings were to be submitted for approval to the Puerto Rico Regulations and Permits Administration ("ARPE").

On February 24, 1981, ARPE issued a resolution approving the internal preliminary development plan for the blocks in the first section of the project, and authorizing submission of construction drawings (plans) for the project's off-site urbanization works to be reviewed by ARPE engineers (technicians). The 1981 ARPE resolution is a formal document, several pages long, ordaining the conditions under which ARPE was approving petitioner's preliminary development plan in accordance with the planning laws, regulations and the ARPE practice or procedures.

One of the conditions required petitioner to submit "a program and timetable for the construction of the urbanization works." Another condition required petitioner to provide "all the works of public facilities and services such as water, electricity, sanitary sewer system and access roads," because the area to be developed lacked "the necessary infrastructure to serve it." In providing these facilities or services, technically known as "urbanization works", petitioner was to follow "the recommendations and requirements of the government agencies concerned."

In order to allow ARPE to review construction plans for urbanization works and determine that these followed the recommendations of the agencies, petitioner had to prepare the construction plans and submit them to the agencies for their approval *before* submitting the plans to ARPE to be reviewed by ARPE engineers. Once approved by the agencies, the construction plans for urbanization works would be

deemed *final* plans, *i.e.* plans ready to be reviewed by ARPE engineers.

ARPE resolutions authorizing submission of final construction plans are in force for a period of one year and this one-year-limitations period is expressly set forth in the text of the resolutions. Proponents of projects unable to submit *final* construction plans before ARPE resolutions expire must request in writing, before the deadline, that ARPE extend the time. Such requests are customarily granted by ARPE, who issues a new resolution that will be in force for another one-year-period.

As a matter of ARPE written practice and procedure the filing of construction plans that lack the Commonwealth agencies' approval and, therefore, are not final plans does not toll the ARPE resolutions' one-year-limitations period. Petitioner's engineers were familiar with ARPE practice and procedures and knew that ARPE's 1981 resolution approving the internal preliminary development plan and authorizing submission of construction drawings for urbanization works would cease to be in force after February 24, 1982, unless the final construction drawings ready for review by ARPE engineers had been submitted by this deadline.

Petitioner did not submit the final construction plans for review by ARPE engineers nor did it request that ARPE extend the time to file the final plans.

Construction drawings for the project's off-site urbanization works had to incorporate the technical information evincing that petitioner's engineers had submitted the drawings to several Commonwealth agencies that were to provide the project with drinking water, sanitary sewers, storm sewers, electric power and access roads, and that the agencies had given their final approval to these urbanization works. This

technical information on the face of the drawings made them final drawings, ready for ARPE review.

Petitioner states that it "timely" submitted drawings to ARPE and endured "years of delay".² The district court nevertheless found that petitioner's drawings were submitted on February 22, 1982 along with a letter acknowledging that the drawings were not final construction drawings for off-site works.³ Petitioner's letter of February 22, 1982 informed ARPE that the final construction drawings . . . "are now being prepared, and at the appropriate time we will submit them for the consideration and endorsements [of the relevant Commonwealth agencies]."

Petitioner overlooks this fact and misstates the actual ARPE practice when it proffers that submission of its drawings in February 1982 "triggered ARPE's statutory duty to process the drawings by performing a technical review of them and issuing a construction permit."⁴ The undisputed fact on record is that petitioner never submitted to ARPE the final construction drawings for the project's urbanization works.

As the district court found, as late in the day as February 26, 1987, that is, *six years* to the date ARPE had issued the resolution authorizing submission of final construction drawing for off-site works, petitioner had yet to submit the final drawings and the only drawings on file with ARPE were the drawings submitted in February 1982 *that lacked the basic information on the urbanization works to serve the project*; a fact which prompted then ARPE administrator Motta to warn petitioner in a letter dated February 26, 1987 ("the Motta letter") that ARPE would dismiss the project, unless petitioner evinced its intent to pursue it by submitting, within one year from the

² "Petition For a Writ of Certiorari . . .", at 4.

³ *Id.*, at A-15.

⁴ *Id.* at 4.

date of the letter, the drawings that should have been submitted in February 1982.⁵

Petitioner distorts the facts and overlooks the actual import of the Motta letter, which is that petitioner by February 1987 had failed to pursue its project after filing construction drawings for urbanization works in February 1982 that lacked the basic information that ARPE engineers would have to review. Petitioner's letter of February 1982 had represented to ARPE that final construction drawings were being prepared and would be submitted for the Commonwealth agencies' approval at a later date; yet, by February 26, 1987 petitioner had not filed the final construction plans for urbanization works ready for review by ARPE engineers. -

The Motta letter of February 26, 1987 stated that ARPE was returning to petitioner the construction drawings that it had submitted in February 1982, because a considerable length of time had elapsed since the Planning Board had approved the project and ARPE could not process the project before the construction drawings had obtained final approval from the relevant Commonwealth agencies.

Contrary to what petitioner states was the practice at ARPE at the time its project was dismissed in August 1988, ARPE's Manual of Procedures authorized the dismissal of a case (project) if a proponent had not filed final construction plans within the one-year-period fixed in the ARPE resolution approving the preliminary development plan. ARPE's February 1981 resolution conditionally approving the preliminary development plan textually advised petitioner that the project

⁵ *Id.*, at A-16. Motta resigned two days after this letter had been typed for his signature. It appears Motta did not ask his personal secretary to mail this letter and, instead, discussed its contents with the ARPE Assistant Administration for Regional Operations. Respondent Rodriguez learned of the existence of this letter when ARPE reviewed the history of the project after petitioner had filed the complaint in December 1987.

would be dismissed, and "filed for all legal purposes", if the resolution expired and final construction drawings for urbanization works that had obtained the endorsements of all relevant agencies had not been filed by the deadline.

Petitioner further states that "consistent with ARPE's ordinary procedures" the Motta letter officially served notice on petitioner "of the status of its drawings" and of the "additional information required to complete their processing."⁶ Petitioner suggests that without knowledge of the contents of this letter, petitioner could not learn of "the status" of the construction drawings it had submitted to ARPE in February 1982. Actually, petitioner *knew* that it had not submitted final construction drawings for off-site works within the one-year period of the 1981 ARPE resolution: the letter that accompanied submission of the drawings on February 22, 1982 acknowledged this much. Petitioner need not have received the Motta letter in order to learn that it had not submitted final construction drawings for urbanization works in February 1982.

During 1986 petitioner frantically tried to revive a project that laid abandoned since February 1982. By then, the winds of yet another controversy over the location of the project in Vacia Talega were churning the Senate. Motta hastily arranged meetings with the heads of several Commonwealth agencies, and in September 1986 also arranged for petitioner to make a personal presentation of the project before the heads of several agencies that were convened in a special meeting.

This concerted effort with the active participation of ARPE ultimately proved unsuccessful. On November 14, 1987 the local press was reporting on the Governor's remarks

⁶ *Id.* at 4.

that the Planning Board would review policy guidelines on land use in Vacia Talega.⁷ Petitioner's statement that by December 1987 the project was "beyond any stage of policy review" (Pet. 5) misstates the facts and seems to overlook that the Planning Board's decision to revisit policy guidelines on land use in Vacia Talega in November 1987 superseded, for the time being, the Board's prior policy on land use in Vacia Talega.

The Non-Issue Over Facts Outside The Pleadings

The district court relied on several facts outside the pleadings because the court granted respondents' motion to dismiss on the eve of trial, after the parties had concluded extensive discovery and their factual allegations had been incorporated in the pretrial order. Respondent Rodriguez had moved for summary judgment and petitioner had duly opposed the motion and filed with the court a large binder of "exhibits", among them, newspaper clippings reporting on the Governor's November 13, 1987 remarks that the Planning Board would review guidelines on land use in Vacia Talega.

The Motta letter of February 26, 1987 and petitioner's letter of February 1982 acknowledging that the drawings it was submitting to ARPE were not final drawings for urbanization works were among the many "exhibits" designated by petitioner as its trial "exhibits". The district court implicitly treated respondents' motion to dismiss as one for summary judgment; but only after petitioner had duly opposed Rodriguez's motion for summary judgment.

Petitioner suggested on appeal that the district court had erred in relying "on selected facts outside the pleadings" when it granted the motion to dismiss. After the court of appeals

⁷ *Id.*, at A-16.

reviewed the district court's judgment disregarding "all factual allegations contained elsewhere in the briefs and in the record",⁸ petitioner argued for the first time in a "Petition for Rehearing" that the court of appeals should have considered other factual allegations submitted in the pretrial order.

The court below noted that petitioner was not only raising the issue for the first time but was, additionally, recanting its former views that the district court should *not* have relied on facts outside the pleadings when it had purported to grant a motion under Rule 12 (b) (6). The court below denied the "Petition for Rehearing".⁹

Several of the facts outside the pleadings on which the district court relied, specifically, the press reports on November 14, 1987 that the Planning Board would review policy guidelines on land use in Vacia Talega, and that the Governor was acting in response to a Senate bill that would preserve Vacia Talega in its natural state and would condemn petitioner's parcel, after the senators who sponsored the bill had called on the Governor to freeze petitioner's project¹⁰ were discussed in a meeting between the president of petitioner and the Governor's Special Advisor on Tourism.

Petitioner nevertheless proffers that during the course of this meeting held in December 1987, its president was told by the Governor's aide that the Governor "had determined some time before to keep the project from going forward for personal and political reasons."¹¹ As the district court held, "the governor's

⁸ *Id.*, at A-2 n.1

⁹ *Id.*, at A-11 and A-12.

¹⁰ *Id.*, at A-16.

¹¹ *Id.*, at 5. Respondents note that petitioner clarified to the district court that its Amended Complaint was *not* pleading a theory that Rodriguez's alleged conduct was motivated by a politically partisan animus in violation of petitioner's First Amendment rights. See, "Petition for a Writ of Certiorari . . .", at A-23 n.8.

remarks in the press that his views on the development of Vacia Talega had changed . . . cannot be characterized as impermissible, even if made with a view to appease voters, rather than for truly environmental reasons. . . ."¹²

Three days after the press reported that the Planning Board would revisit policy guidelines on land use in Vacia Talega, an employee of petitioner's engineering firm visited ARPE and attempted to file the preliminary development plans for structures (buildings) that ARPE had returned to petitioner in March 1982, advising at the time that their filing was premature and not in accordance with the ARPE February 1981 resolution that called for construction drawings for urbanization works to be reviewed first. ARPE told the employee that in light of the Planning Board's decision to review guidelines on land use in Vacia Talega ARPE could not accept the plans.

Since ARPE would not accept the plans, the following day petitioner served them on ARPE by certified mail, return receipt requested, along with a letter telling ARPE that whether or not it decided to approve the plans ARPE had no legal authority to refuse to receive them.¹³

A "Taking" Claim Abandoned

A few days after the president of petitioner met with the Governor's special aide, petitioner, who did not name the Governor nor the Planning Board a defendant to this action, filed a complaint against ARPE and Rodriguez in the district court alleging that their "undue delay and deliberate refusal to

¹² *Id.*, at A-23-24.

¹³ ARPE placed these drawings in the project's case files and mistakenly referred to them nine months later at the time it notified petitioner that it was dismissing the project.

review the construction drawings" amounted to a "taking" of its property without just compensation. Respondents moved to dismiss on the ground, *inter alia*, that this claim was not ripe. The project's case files at ARPE were referred to the ARPE legal department after petitioner filed the complaint.

Before the district court had ruled on respondents' motion to dismiss the complaint petitioner filed the "Amended Complaint" and pleaded its case on three different theories, abandoning the "taking" claim.

The ARPE legal department met with the ARPE engineers who had reviewed the project's case files for Motta in February 1987, and who had then informed Motta that ARPE could not process the project because, among other reasons stated in the Motta letter, the construction drawings for urbanization works on file since February 1982 lacked the basic information relevant to the urbanization works to serve the project. A detailed report on the history of the project was prepared by the engineers, after which ARPE attorneys advised Rodriguez that since petitioner had not met the conditions of the ARPE February 1981 resolution approving the preliminary development plan for the project, ARPE could dismiss the project under Sec. IV (5) of Part I of the Manual of Procedures.

In August 1988, ARPE accordingly notified petitioner in writing that it was dismissing the case, because the final construction drawings for urbanization works had not been submitted for ARPE review while the ARPE February 1981 resolution conditionally approving the preliminary development plan remained in force. Petitioner timely requested a reconsideration of this decision, and filed the Amended Complaint in the district court before ARPE denied reconsideration in December 1988, advising petitioner of its right to seek judicial review of this decision under P.R. Laws Ann. tit. 23 § 72 d.

A decision dismissing a project because the ARPE resolution conditionally approving the preliminary development plan has expired requires the proponent of the project to apply to the Planning Board to reopen the case, if the proponent wishes to resume the case.

*The Amended Complaint:
ARPE's "Established Custom and Practice"*

The Amended Complaint alleged that ARPE had engaged in "undue delay" in processing the construction drawings submitted in February 1982 and had failed to process them in accordance with an "established custom and practice" that obligated ARPE engineers to comment on construction drawings or issue requests for their clarification "within one year" of their submission for ARPE review. Respondents' alleged failure to observe this custom and practice in connection with petitioner's drawings was claimed to have caused the deprivation of petitioner's *substantive* rights protected by the Fourteenth Amendment.¹⁴

Respondents submitted to the district court that as a matter of ARPE regulations and procedures the actual "established custom and practice" at ARPE required engineers reviewing

¹⁴ Petitioner's postulation of a limitations period that allegedly required ARPE engineers to notify of deficiencies in the plans "within one year" of their submission was changed on appeal to "within one year" of the ARPE resolution ("prior to the expiration of the one-year deadline"). Were one to assume *arguendo* that petitioner filed final construction drawings on February 22, 1982, petitioner's reformulation on appeal of the "established custom and practice" would have allowed ARPE engineers just *two days* to review the drawings and ask for their clarification. Actually, under the precertification procedures that applied to petitioner's project at the time no such time limitation was imposed on ARPE engineers; they were to review *final* construction plans "within a reasonable time".

final construction plans to notify proponents of any error or discrepancy, or of information lacking in the *final* plans submitted for review.

The Procedural Due Process Claim In The District Court

A separate paragraph of the Amended Complaint alleged that the August 1988 decision to dismiss the project was not preceded by "notice or an opportunity to be heard" and, therefore, had deprived petitioner of its property rights without procedural safeguards. During the course of the briefing in the trial court petitioner fleshed out this procedural due process claim and argued, under *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), that it was entitled to "an opportunity to be heard at a meaningful time and in a meaningful manner" because "where the government decision is made pursuant to 'established state procedure', a hearing prior to the deprivation is ordinarily required."¹⁵

Petitioner *did not claim while the case was in the district court* that ARPE established custom and practice afforded a *predeprivation hearing* before ARPE issued a decision *dismissing* a project; rather, petitioner alleged that it was not afforded *the notice* of the information lacking in its construction drawings that the Motta letter would have afforded had the letter been sent to petitioner. Petitioner claimed that respondents' failure to forward the letter was a deviation from the customary practice and procedure at ARPE of issuing written comments ("notice") of defects in construction plans under review.

¹⁵ "Opposition of Plaintiff PFZ Properties, Inc. to Motion for Summary Judgment of Defendant Rodriguez", at 81; "Opposition of Plaintiff PFZ Properties, Inc. to Motion To Dismiss of Defendants ARPE and Rodriguez", at 43.

The Procedural Due Process Claim In The Court of Appeals

By the time this case reached the court of appeals petitioner's procedural due process claim had become more intricate. Petitioner now claimed that "the established procedure" at ARPE provided *predeprivation process*, because it afforded proponents of construction projects written "notice" of any deficiencies in construction plans and "an opportunity" to correct the plans. Petitioner's brief on appeal offered repeated, purposeful statements that it was *not* challenging the established ARPE customary practice and procedure, and included the remark in a footnote that "ironically, if PFZ challenged the procedures established by ARPE's Manual of Procedures the Court would be required to give 'substantial weight' to ARPE's 'good faith judgments' that the procedures it provides 'assure fair consideration of the entitlement claims of individuals.' *Mathews*, 424 U.S. at 349."¹⁶

To be sure, the established "customary practice and procedure" at ARPE that required ARPE engineers to notify proponents of any defect in the plans under review required, *also*, that proponents submit *final* construction plans for review. As petitioner acknowledged, there was a *written* source for this customary practice and procedure: the ARPE Manual of Procedures which petitioner reproduced in the Addendum to its main brief on appeal. Petitioner could not claim, and did not claim the existence of an *unwritten* source of a "customary" practice or procedure at ARPE.

Petitioner further argued on appeal that respondents departed from established ARPE "customary practice and procedure" when they dismissed petitioner's project, because ARPE and Rodriguez did not serve *written notice* on petitioner

¹⁶ "Brief of Plaintiff-Appellant" at 37 n.70, citing *Mathews v. Elridge*, 424 U.S. 319 (1976).

that the construction drawings submitted in February 1982 had been found wanting. Petitioner alleged that ARPE "without fail" had afforded this *predeprivation process* "in every other case" save petitioner's; adding that respondents' failure to afford petitioner this process was Rodriguez's way of retaliating against petitioner for having filed the complaint against respondents.

*The Actual Scope of the Process Afforded Under
Puerto Rico Law*

Petitioner now misrepresents to this Court that respondents' decision to dismiss the project in August 1988 "was inconsistent with customary ARPE practice and procedure" because respondents "determined that the decision . . . would be made without providing a *predeprivation hearing*." (Pet. at 6). Petitioner suggests that ARPE's customary practice and procedure afforded a *hearing* before ARPE issued decisions *dismissing* construction projects conditionally approved by ARPE resolutions. (Pet. at 8 n.5).

As a matter of Puerto Rico planning statutes, regulations and ARPE Manual of Procedures, ARPE's decisions *dismissing* projects under Sec. IV (5) of Part I of the ARPE Manual of Procedures are notified in writing to all proponents of construction projects which have been preliminarily approved by ARPE resolutions ("approved projects"). These decisions are *not* preceded by any notice or hearing. Proponents adversely affected by decisions dismissing their projects must request, within thirty days from the day they are mailed the decision, that ARPE reconsider the decision.

Judicial review of ARPE adverse decisions after a timely filed motion for reconsideration is *the sole process* that Puerto Rico planning laws afford under P.R. Laws Ann. tit. 23 Sec. 72d. Petitioner availed itself of this process and sought judicial

review of respondents' decision both before the Superior Court and the Supreme Court of Puerto Rico. As a matter of state planning laws, regulations and written manual of "customary practice and procedures" petitioner *cannot claim that respondents departed from ARPE's "established custom and practice" when they dismissed the project without affording a hearing.*

REASONS FOR DENYING THE PETITION

As Regards the First Question Presented in the Petition:

- I. THE COURT NEED NOT REVIEW THIS QUESTION, BECAUSE UNDER PUERTO RICO PLANNING LAWS, REGULATIONS AND ARPE PRACTICE AND PROCEDURES PETITIONER DID NOT HAVE A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN RECEIVING A CONSTRUCTION PERMIT.

Respondents exhaustively argued in both courts below that in the factual context of this case the Puerto Rico planning laws, regulations and ARPE's written manual of "customary" practice and procedures do not create in favor of petitioner a constitutionally protected property interest in receiving a construction permit. The lower courts refused to consider this question, although the court of appeals expressed its views that it was "far from clear that PFZ's expectation of receiving a construction permit from ARPE constituted a property interest under Puerto Rico law."¹⁷ Respondents have properly preserved this question for review by this Court and now pursue it as one reason for denying certiorari.

Although the question is of the sort usually reserved to the trial court for adjudication, respondents deem the facts found by the district court legally sufficient to conclude that under

¹⁷ "Petition for a Writ of Certiorari . . .", at A-5.

Puerto Rico planning laws, regulations and ARPE practice and procedures petitioner's expectation of receiving a construction permit did not rise to the level of a "legitimate claim of entitlement" protected by the Due Process Clause.

Constitutionally protected interests originate in extra-constitutional sources: they are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . ." *Cleveland Bd. of Education v. Loudermill*, 478 U.S. 532, 538 (1985); *Bishop v. Wood*, 426 U.S. 341, 344 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The hallmark of property is an individual entitlement grounded in state law, which cannot be removed except "for cause". *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978); *Goss v. Lopez*, 419 U.S. 565, 573-74 (1975).

The facts in the record of this case support a conclusion that petitioner did not have a "legitimate claim of entitlement" in connection with its expectation of receiving a construction permit. Petitioner has both misstated and neglected to state the vital facts in the record of this case that support this conclusion. Some of these facts include those outside the allegations in the Amended Complaint on which the trial court relied, after the parties could not cast even the shadow of a dispute over these material facts that were the product of time-consuming and extensive discovery. Although the courts below assumed the existence of a property interest in connection with petitioner's expectation of receiving a construction permit, the facts on record are sufficient to make a determination to the contrary; and these facts include those which petitioner has both misstated and overlooked.

ARPE's February 1981 resolution was a formal document, several pages long, fixing the conditions under which ARPE

was approving the preliminary development plan for the project's first phase; approval that was also conditioned on petitioner's compliance with the planning laws, regulations and the procedures at ARPE. ARPE was created in 1975 as the "permits division" of the Planning Board. It approves preliminary development plans for construction projects *only after* the Planning Board has followed Puerto Rico planning and zoning laws and regulations in deciding to approve a proposal to develop land.

The conditions under which the ARPE February 1981 resolution was approving petitioner's preliminary development plan for the project's first phase embodied the requirements that the planning laws, regulations and ARPE practice impose on proponents of construction projects applying for a construction permit. Policy considerations of the highest order dictate the formalities attendant to these applications. ARPE issues a *resolution* that incorporates the Planning Board's prior *adjudication* of a proponent's *case*. These formalities are justified by the government's interest in exercising control and supervision over applications for construction permits in Puerto Rico.

ARPE's February 1981 resolution authorized petitioner to submit final construction plans for urbanization works during the one-year-period that the conditional approval of the preliminary development plan would be in force. As petitioner acknowledged in the letter that accompanied submission of its construction drawings on February 22, 1982, these "timely" submitted construction plans were not final plans for the project's urbanization works. Petitioner's letter represented to ARPE that the final construction drawings were under preparation and would later be submitted to the relevant Commonwealth agencies for their approval.

As the Motta letter of February 26, 1987 established, petitioner had yet to submit the final construction plans for urbanization works in February 1987. It remains an undisputed fact in the record of this case that petitioner never filed these plans with ARPE for review by ARPE engineers. During 1986 petitioner contacted ARPE in an eleventh hour attempt to revive a project that laid forsaken since 1982. Nonetheless, there was not much that former administrator Motta could do other than arrange for petitioner to present the project before the Commonwealth agencies in September 1986. *ARPE under Motta's command was unable to process the project in February 1987* because petitioner had not filed final construction drawings for urbanization works in February 1982.

After the whirl of hastily arranged meetings with the Commonwealth agencies and petitioner's presentation of the project to the agencies Motta had no choice but to conclude *what petitioner had known all along*: that petitioner would have to start from scratch and submit the construction drawings with the agencies' approval which petitioner had failed to submit in February 1982. By then, however, it was too late for the project to escape the Planning Board's revisiting of policy guidelines on land use in Vacia Talega.

An additional fact as found by the district court that supports the conclusion that petitioner did not have a "legitimate claim of entitlement" to a construction permit is the Planning Board's decision in November 1987 to review policy guidelines on land use in Vacia Talega. As respondents argued in their brief on appeal petitioner could ill claim an "entitlement" to a construction permit to build a project in Vacia Talega, when environmental or ecological policy could legitimately carry the day.¹⁸ Petitioner overlooks the actual import of the

¹⁸ The Board subsequently advised petitioner that a project in Vacia Talega was still feasible, but that in light of current parameters and new restrictions imposed by, among others, federal legislation on the management of coastal zones the Board could not approve the project as envisioned in 1976.

Governor's November 1987 decision to instruct the Planning Board to review policy guidelines on land use in Vacia Talega, when it states in the Petition that by the time its president met with the Governor's aide in December 1987, the project "*was beyond any stage of policy review and the only legitimate inquiry for ARPE was into the technical merits of drawings submitted for review*". (Pet. at 5)

Respondents once more contend that under the Puerto Rico planning laws, regulations and ARPE customary practice and procedures petitioner did not have a constitutionally protected property interest in receiving a construction permit. Respondents submit to the Court that it need not consider the first question presented in the Petition, because in the factual context of this case petitioner did *not* have a "legitimate claim of entitlement" to a construction permit of which respondents could not deprive it without affording notice and an opportunity to be heard. *Board of Regents v. Roth, ante*, 408 U.S. at 577; *Memphis Light, ante*, 436 U.S. at 9.

II. ASSUMING *Arguendo* THE EXISTENCE OF A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST, *Zinerman v. Burch*¹⁹ IS DISTINGUISHABLE AND INAPPOSITE BECAUSE ARPE'S MANUAL OF PRACTICE AND PROCEDURE DOES NOT CHARGE RESPONDENTS WITH A DUTY TO IMPLEMENT PROCEDURAL SAFEGUARDS BEFORE ARPE ISSUES DECISIONS DISMISSING PROJECTS.

Respondents earlier stated that as a matter of Puerto Rico planning laws, regulations and ARPE Manual of Procedures, ARPE does not provide a hearing before it issues a written decision *dismissing* a case on the ground that the ARPE resolution conditionally approving the preliminary development plan is no longer in force. This is a decision expressly authorized by Sec. IV (5) of Part I of the Manual of Procedures. Under P.R. Laws Ann. tit. 23 § 72d the only process afforded is judicial review of this decision, and petitioner availed itself of judicial review both before the Superior Court and the Supreme Court of Puerto Rico. Respondents are not entrusted by the state planning laws, regulations and ARPE Manual of Procedures with a duty to implement any procedural safeguards *before* ARPE dismisses a project on the ground that the ARPE resolution conditionally approving the preliminary development plan is no longer in force.

After this Court announced its decision in *Zinerman* petitioner on appeal concocted a theory of a procedural due process deprivation premised on the alleged existence of "predeprivation process" in ARPE's Manual of Procedures. Petitioner advanced its theory through repeated, purposeful

statements in its brief that it was not challenging the adequacy of ARPE's customary practices and procedures allegedly providing "predeprivation process." Nevertheless, Puerto Rico's planning laws, regulations and ARPE Manual of Procedures do *not* charge respondents with a duty to implement any procedural safeguards *before* ARPE issues decisions dismissing projects. This case is, therefore, distinguishable on its facts from *Zinerman*.

In *Zinerman*, a majority of the Court focused on the extent to which the state's officials were given not only the statutory power and authority to effect the deprivation complained of, but also *the concomitant duty to initiate the procedural safeguards established by state law* to guard against the risk of that deprivation. The *Zinerman* Court was presented with a deprivation of liberty which resulted from the "voluntary" admission of the plaintiff to a mental health facility at a time when he was arguably not competent to give "knowing and informed consent" to his admission.

The Florida state statutes examined by the Court denoted a comprehensive scheme ostensibly foreclosing "voluntary" admissions of mentally incompetent persons; yet, the voluntary admission statute did *not* direct any doctor at the mental facility to determine whether a person being "voluntarily" admitted was, in fact, competent to give the necessary consent. The voluntary admission statute did not direct any official to initiate the "involuntary" admission statutory procedure for those patients thought to be incompetent. The Court expressed that

¹⁹ 494 US ___, 110 S.Ct. 975, 108 L.Ed. 2d 100 (1990).

the case did *not* involve a facial challenge to the Florida voluntary admission statute, inasmuch as the plaintiff had apparently conceded that strict compliance with the Florida statutory scheme adequately protected against the liberty deprivation endured by the plaintiff.

As the Court found, the voluntary admission statute gave the officials at the mental health facility broad discretion in admitting patients under the provisions of the statutory scheme but did not provide for procedural safeguards necessary to protect against any potential abuse of that broad discretion. 494 U.S. ____ at ____, 110 S.Ct. at 988. Because the Court found that the risk of exactly the type of liberty deprivation which had occurred was entirely "predictable" at a specific point during the mental health admissions process, 494 U.S. at ____, 110 S.Ct. at 989, the Court concluded that the officials' conduct in failing to implement *the state's statutorily ordained procedural safeguards* was not "random" and "unauthorized" conduct.

Zinermon is, thus, a case of *statutory oversight*; i.e. a case involving a statute that broadly delegated officials the authority to effect the deprivation at issue in that case, and *the failure of that same statute to provide for effective predeprivation safeguards*. It was in view of this *statutory oversight* that the majority in *Zinermon* concluded that the deprivation which had occurred was "predictable" and, as such, not "random." See, *Easter House v. Felder*, 910 F.2d 1387 (7th Cir.) *cert. denied* 111 S.Ct. 783 (1991).

In contrast, the Puerto Rico planning laws, regulations and ARPE's Manual of Procedures do not, as a matter of state law, charge respondents with any duty to implement procedural safeguards *before* they dismiss a project on the ground that the ARPE resolution conditionally approving a plan for the preliminary development of the project has expired, and the

proponent has not met the conditions textually set forth in the resolution before the one-year deadline. The date on which the resolution expired and the failure of a proponent to submit by the deadline the final construction plans are readily ascertainable facts; and they do not warrant the burdening of the state's resources with a requirement that procedural safeguards be implemented *before* a decision is made to dismiss a project, in order to prevent the risk of an erroneous determination.

As a matter of Puerto Rico planning laws, regulations and ARPE practice and procedures no procedural safeguards are provided before ARPE issues decisions *dismissing* projects. *Zinermon* is, therefore, inapposite.

As Regards the Second Question Presented In The Petition:

III. THE SECOND QUESTION IN THE PETITION IS NOT PROPERLY PRESENTED BY THE FACTS OF THIS CASE AND THIS COURT HAS NO OCCASION TO CONSIDER THE ALLEGED SPLIT OF AUTHORITY IN THE CIRCUITS.

The second question in the Petition is so broadly phrased it seems petitioner would ask the obvious. The facts of this case, however, afford no occasion to consider an alleged split of authority in the circuits on the issue whether substantive due process rights are implicated in situations involving the denials of permits. The First Circuit has not carved an exception to the standard of conduct that "shocks the conscience" in this particular context. Petitioner does not cite to a single First Circuit case holding that in this context, a state actor's conduct cannot ever amount to conduct that "shocks the conscience." *Rochin v. California*, 342 U.S. 165 (1952). Nevertheless, petitioner would ascribe to the First Circuit the view that state actor's conduct in the context of disputes involving a developer and state planning or zoning authorities can never rise to the level of conduct that "shocks the conscience."

The record of this case fails to sustain the alleged deprivation of petitioner's substantive due process rights. The facts found by the district court do not support the claim that respondents arbitrarily, capriciously, illegally and with an evil purpose unrelated to the technical merits of petitioner's project deprived petitioner of a construction permit for its project. The facts as found by the district court do not support review of the second question presented in the Petition.

Respondents' decision to dismiss petitioner's project after the ARPE February 1981 had expired and petitioner had not met the conditions under which ARPE had approved the preliminary development plan was a decision not only authorized by Sec. IV (5) of Part I of ARPE's Manual of Procedures but, additionally, by *the text* of the ARPE February 1981 resolution authorizing the submission of final construction plans for the project's urbanization works to be reviewed by ARPE engineers. As presented by the facts of this case respondents' decision was neither arbitrary nor capricious, let alone "illegal."

The factual situation of this case, much more complex than petitioner has indicated to the Court, cautions against the exercise of the Court's discretion to hear a dispute that concerns a matter uniquely in the domain of a state's interest in its land development and environmental policies and its interest in exercising control and supervision over applications for construction permits. The pleading of deprivations of protected rights on a substantive due process theory suggests "caution and restraint". *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion, Powell, J.); *Amsden v. Moran*, 904 F.2d 748, 754 (1st Cir. 1990) *cert. denied*, 111 S.Ct. 713 (1991) (referring to the "circumscribed precincts patrolled by substantive due process").

The decision of the court below on this point is neither unfair nor inaccurate. The facts of this case would not have supported a finding of a deprivation of substantive due process rights had the court below employed the alternate test of conduct that "shocks the conscience."

Petitioner, to be sure, alleged egregiously unacceptable, outrageous conduct on the part of respondents in connection with their decision to dismiss petitioner's case at ARPE; but the facts as found by the district court did not show that respondents' alleged conduct met either the standard of conduct that "shocks the conscience" — *Rochin, ante*, 342 U.S. at 172, 173 — or the standard that reads into the Fourteenth Amendment an additional requirement of a deprivation of a specific constitutional right. *Chongris v. Bd. of Appeals*, 811 F.2d 36 (1st Cir.), *cert. denied*, 483 U.S. 1201 (1987).

CONCLUSION

For the reasons stated in this brief, the petition for certiorari should be denied.

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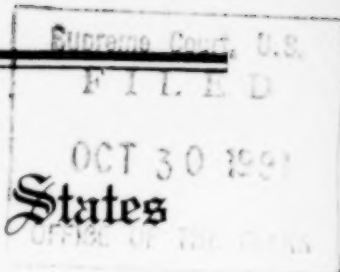
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PFZ PROPERTIES, INC.,
Petitioner,

v.

RENE ALBERTO RODRIGUEZ, *et al.*,
Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT**

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	2
PROCEDURAL DUE PROCESS	2
SUBSTANTIVE DUE PROCESS	6
CONCLUSION	7

TABLE OF AUTHORITIES

CASES:

<i>Chiplin Enterprises, Inc. v. City of Lebanon</i> , 712 F.2d 1524 (1st Cir. 1983)	6
<i>Parratt v. Taylor</i> , 451 U.S. 527 (1981)	3, 4
<i>PFZ Properties, Inc. v. Rodriguez</i> , 928 F.2d 28 (1st Cir. 1991)	4, 5, 6
<i>PFZ Properties, Inc. v. Rodriguez</i> , 739 F. Supp. 67 (D.P.R. 1990)	5
<i>Zinerman v. Burch</i> , 494 U.S. ___, 110 S.Ct. 975 (1990)	<i>passim</i>

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PFZ PROPERTIES, INC.,
Petitioner,

v.

RENE ALBERTO RODRIGUEZ, *et al.*,
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**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
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PETITIONER'S REPLY BRIEF

Petitioner PFZ Properties, Inc. ("Petitioner" or "PFZ") hereby submits its reply to Respondents' Brief in Opposition to the Petition for Certiorari ("Opposition" or "Opp.>").

INTRODUCTION

The decision of the Court of Appeals presented the two narrowly drawn issues of constitutional due process which form the basis for PFZ's Petition for a Writ of Certiorari ("Petition"). This was done within the context of the Amended Complaint assuming the allegations as true and drawing all reasonable inferences in favor of the Petitioner. Although PFZ submits that the legal arguments relied upon by the Court below are inconsistent with prior Supreme Court precedent and the decisions of numerous other Circuits, the factual framework for the decision below was straightforward.

Respondents' Brief in Opposition does not dispute the existence of a conflict in the circuits on the issues of due process decided by the Court below. Respondents' arguments essentially consist of an unsuccessful attempt to distinguish *Zinermon v. Burch*, 494 U.S. ___, 110 S.Ct. 975 (1990), and a number of factual arguments that depart from the allegations and inferences ascribed to the Amended Complaint by the Court of Appeals.¹

PROCEDURAL DUE PROCESS

The facts essential to PFZ's procedural due process claim were set forth succinctly by the Court of Appeals. PFZ's Amended Complaint alleged a deprivation of a

¹ Most of Respondents' factual arguments either played no role in the Court's decision below or are disputed facts at the trial level which need not be resolved to reach the issues raised in the Petition. Petitioner notes, however, that the record below is complete, since this case was dismissed on the eve of trial after the pretrial order was entered. The factual record developed by Petitioner before the District Court is a rich one, which amply supports its claims. Despite Respondents' efforts to confuse the facts, the statement of the case in the Petition is accurate.

property interest² without the benefit of prior notice or an opportunity to be heard. The process by which the deprivation occurred violated ARPE custom and procedure. That deprivation was effected by the deliberate action of the head of the Agency acting in concert with senior subordinates. The deprivation resulted in an alleged denial of procedural due process.

These facts justify granting the Petition in light of the constitutional issues left unresolved by *Zinermon v. Burch*, 494 U.S. ___, 110 S.Ct. 975 (1990), and numerous circuit decisions. See Petition at 9-11 and cases cited therein. *Zinermon* found actionable procedural due process violations to exist when (1) state officials were delegated power and authority to effect the deprivation complained of, and (2) the state delegated an accompanying duty to initiate procedural safeguards to prevent the deprivation. 494 U.S. at ___, 110 S.Ct. at 990. In such circumstances, the Court found that the state officials' conduct could not be "random and unauthorized" within the meaning of the *Parratt* exception. See discussion in Petition at 8-10.

Zinermon's facts did not present the specific question of when, if ever, actions of the head of an agency which effect a deprivation would constitute "random and unauthorized" conduct such that *Parratt* would apply. The instant Petition does present that issue, because the personal involvement of the Respondent Rodriguez as the head of the agency carried with it the endorsement of the state

² As the Respondents note, the Court of Appeals presumed a property right existed for purposes of its analysis. The decision below therefore presents this Court with the opportunity to resolve the constitutional issue of whether the denial of predeprivation process by high government officials constitutes "random and unauthorized" conduct as contemplated by *Parratt v. Taylor*, 451 U.S. 527 (1981), in a narrowly-drawn context. Nonetheless, Petitioner disputes Respondents' arguments that PFZ did not have a property right, and relies on PFZ's arguments in its briefs below.

apparatus. As such, Rodriguez was clothed with broadly delegated authority to effect the deprivation of PFZ's interests.

Respondents have not addressed this issue. Indeed, they do not dispute that the extent to which a state official's station and rank may confer broadly delegated power and authority so as to obviate a defense of "random and unauthorized" conduct is an issue unresolved in the Circuits. Instead, Respondents attempt to distinguish the Supreme Court's decision in *Zinermon v. Burch* by arguing that ARPE had not prescribed procedures to afford Petitioner notice and an opportunity to be heard on the dismissal. They then conclude that Rodriguez had no obligation to implement procedures to prevent the deprivation complained of and that the second element of the *Zinermon* scenario is not present.

The Court of Appeals, however, proceeded on the basis that Respondents "*illegally departed from Puerto Rico's prescribed procedures*" (emphasis added). Relying on *Parratt*, it observed that "[w]hen a deprivation of property results from conduct of state officials violative of state law, . . . failure to provide predeprivation process does not violate the Due Process Clause." *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31 (1st Cir. 1991); Petition at A-5. It then affirmed the dismissal concluding that it made "little sense to argue that ARPE had to afford plaintiff a hearing *before it illegally departed from its own procedures*" (emphasis added) and that "[t]he state is not required to anticipate *such violations of its own constitutionally adequate procedures*" (emphasis added). *Id.* In view of the above, Respondents' distinction has no application to the case before the Court.³

³ Indeed, a number of circuits have expressed the view that the grant of broadly delegated authority to a senior official to effect a deprivation may be sufficient to implicate due process if the state official merely "had the power" to provide a hearing but did not do so. See *Zinermon v. Burch*, 494 U.S. at ___, n.2, 110 S.Ct. at 978, n.2, and cases cited therein.

Moreover, Respondents' argument proceeds from an assumption that, if no drawings were filed within the specified time period, the project could be dismissed without a hearing under Puerto Rico law. However, the District Court's opinion states that "PFZ *timely submitted* to ARPE construction drawings for site improvements for the subdivision works of block 2 of the first section ('the construction drawings') *as required by the 1976 Planning Board Resolution and the 1981 ARPE Resolution*" (emphasis added).⁴ *PFZ Properties, Inc. v. Rodriguez*, 739 F. Supp. 67, 69-70 (D.P.R. 1990); Petition at A-14 to A-15. The Court of Appeals reached essentially the same conclusion. *PFZ*, 928 F.2d at 29-30; Petition at A-3.

In any event, Respondents' argument in this regard is based on factual arguments which Petitioner refuted in the record below. Once drawings are filed in cases such as the Petitioner's, ARPE custom and procedure, as alleged in the Amended Complaint and testified to by numerous deposition witnesses,⁵ required notice and an opportunity to be heard. The ARPE Manual of Procedures, which was before both the District Court and the Court of Appeals,

Compare *id.*, 494 U.S. at ___, 110 S.Ct. at 994 (O'Connor dissenting) (arguing against recognition of a due process claim, *inter alia*, because petitioners in *Zinermon* were not charged with formulating policy).

⁴ Respondents not only ignore the District Court's opinion, but purport to conduct an evaluation of the merits of PFZ's submission in their brief, albeit through misleading references to drawings for *off-site* works which were not involved in the dismissal decision. Indeed, the whole exercise appears incongruous, since Respondents admit that they had reviewed the wrong set of drawings in reaching their "decision". Opp. at 11, n.13. The record below (deposition testimony and documents) also reflects that PFZ inquired repeatedly about its drawings from the time they were filed.

⁵ These included the Respondent Rodriguez, his principal assistants, his predecessor Administrator Motta, the author of the Manual, and every other ARPE witness who was deposed.

also required that the project proponent be provided with notice and an opportunity to be heard once drawings were filed.⁶ While the evidence below in its favor might be characterized as overwhelming on this point, the Petitioner need not go that far.⁷ Instead, it respectfully submits that this, like the other issues raised in the Opposition, is at best a factual issue in dispute below which should be construed in Petitioner's favor for purposes of these proceedings.

SUBSTANTIVE DUE PROCESS

As the Respondents concede, Petitioner alleged "egregiously unacceptable, outrageous conduct on the part of respondents in connection with their decision to dismiss petitioner's case ..." Opp. at 27. While acknowledging that Petitioner had alleged arbitrary and capricious conduct, the Court below ruled upon Petitioner's claims in the context of a unique line of authority which has evolved in the First Circuit. Petition at A-6. That line of authority has put forth a standard which provides that an arbitrary, capricious or illegal denial of a building permit cannot implicate due process, *unless* the motivation is accompanied by the deprivation of *another* specific constitutional right. See *Chiplin Enterprises, Inc. v. City of Lebanon*, 712 F.2d 1524, 1528 (1st Cir. 1983). Respondents do not dispute that this standard acted to deprive the Petitioner of a substantive due process claim in the Court below. Opp. at 27. Nor do they dispute that the standard is a well-recognized departure from that applied by numerous other Circuits. See generally Petition at 13-14 and n.9, and decisions cited therein. Accordingly, the Petition should be granted to resolve this conflict in the Circuits.

⁶ Once the proponent files its drawings for review it must receive written notice of any "objections" and must be notified "to come and discuss the case at the [ARPE Regional] office."

⁷ Indeed, the "Motta" letter, which Petitioner never received because of Respondents' misconduct, reflects ARPE's practice of providing notice and an opportunity to be heard in circumstances such as that involving PFZ.

CONCLUSION

For the above reasons and those set forth in the Petitioner's principal brief, the Petition should be granted.

Respectfully submitted,

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No. 91-122

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

PFZ PROPERTIES, INC.,

vs.

Petitioner,

RENE ALBERTO RODRIGUEZ, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 22, 1991
CERTIORARI GRANTED NOVEMBER 12, 1991

TABLE OF CONTENTS

	Page
Manual of Procedures for Processing Construction Plans and Inscription Plans for Urbanizations dated June 26, 1975	1
Resolution and Order, Second Extension to Report Number 72-Urb.-001-F, Planning Board dated May 14, 1976	13
February 22, 1982 letter from L. Rodriguez (Basora & Rodriguez) to E. Colon Arizmendi (Administrator, ARPE)	36
March 24, 1982 letter from J. Colon Miranda (Assistant Administrator, ARPE) to L. Rodriguez (Basora & Rodriguez)	40
May 22, 1984 letter from J. Maldonado (Assistant Administrator, ARPE) to Basora & Rodriguez	43
January 27, 1986 letter from L. Rodriguez (Basora & Rodriguez) to L. Motta (Administrator, ARPE) ...	46
April 10, 1986 letter from P. Custodio (Chairman, Planning Board) to L. Motta (Administrator, ARPE)	49
August 18, 1986 letter from L. Motta Garcia (Administrator, ARPE) to L. A. Rivera Cabrera (Special Aide to Governor)	52
August 27, 1986 letter from C. Marcano Robles (Assistant Administrator, ARPE) to V. Basora and L. Rodriguez (Basora & Rodriguez)	56
February 26, 1987 letter from L. Motta Garcia (Administrator, ARPE) to V. Basora (Basora & Rodriguez)	60
October 8, 1987 letter from L. Rodriguez (Basora & Rodriguez) to R. Rodriguez (Administrator, ARPE).	64
The San Juan Star, November 13, 1987	68
The San Juan Star, November 14, 1987	71

	Page
November 20, 1987 letter from L. Rodriguez (Basora & Rodriguez) to R. Rodriguez (Administrator, ARPE)	73
December 2, 1987 memorandum from A. Francis (Office of the Governor) to H. Rivera Cruz (Secretary of Justice), J. Mendez (Secretary of Natural Resources), P. Ortiz Alvarez (Secretary of Consumer Affairs), J. Nazario (Secretary of Housing), L. Gonzalez (Secretary of Recreation and Sports), P. Custodio, (Chairperson, Planning Board), R. Rodriguez (Administrator, ARPE), and M. Domenech (Executive Director, Tourism Company)	79
The San Juan Star, December 3, 1987	82
December 4, 1987 letter from R. Rodriguez (Administrator, ARPE) to A. Francis (Adviser to the Governor)	85
Complaint dated December 24, 1987	89
January 21, 1988 memorandum from C. Marcano Robles (Assistant Administrator, ARPE) to R. Rodriguez (Administrator, ARPE)	94
Answer to Complaint dated March 30, 1988	107
August 2, 1988 letter from C. Marcano Robles (Assistant Administrator, ARPE) to L. Rodriguez (Basora & Rodriguez)	111
August 2, 1988 letter from V. Gautier (Assistant Administrator, ARPE) to L. Rodriguez (Basora & Rodriguez)	114
August 17, 1988 letter from L. Rodriguez (Basora & Rodriguez) to C. Marcano Robles (Assistant Administrator, ARPE)	117
August 17, 1988 letter from L. Rodriguez (Basora & Rodriguez) to V. Gautier (Assistant Administrator, ARPE)	123

	Page
August 30, 1988 letter from L. Rodriguez (Basora & Rodriguez) to C. Marcano Robles (Assistant Administrator, ARPE)	126
August 30, 1988 letter from L. Rodriguez (Basora & Rodriguez) to V. Gautier (Assistant Administrator, ARPE)	129
Amended Complaint dated October 11, 1988	131
December 16, 1988 letter from R. Rodriguez (Administrator, ARPE) to L. Rodriguez (Basora & Rodriguez)	140
Answer to the Amended Complaint dated December 22, 1988	144
June 13, 1989 deposition excerpts of L. Motta Garcia	148
June 14, 1989 deposition excerpts of V. Gautier Rios	176
June 15, 1989 deposition excerpts of C. Marcano Robles	212
June 16, 1989 deposition excerpts of respondent R. Rodriguez	264
September 12, 1989 deposition excerpts of E. Suarez Ortiz	337
September 12, 1989 deposition excerpts of J. Colon	340
September 13, 1989 deposition excerpts of P. J. Sanchez	348
September 14, 1989 deposition excerpts of C. Marcano Robles	375
October 11, 1989 deposition excerpts of L. Rodriguez	400
October 13, 1989 deposition excerpts of R. Ayala Santiago	415
October 25, 1989 deposition excerpts of A. Navas Davila and C. Chiques	456

	Page
October 26, 1989 deposition excerpts of L. Rodriguez	457
November 1, 1989 deposition excerpts of A. Navas Davila	463
Motion for Summary Judgment of Defendants in the United States District Court for the District of Puerto Rico dated November 15, 1989	464
Motion to Dismiss of Defendants in the United States District Court for the District of Puerto Rico dated November 15, 1989	466
Declaration of J. Katz dated December 18, 1989 ...	468
Declaration of L. Rodriguez Lebron dated December 18, 1989	473
Declaration of R. Rodriguez Lebron dated December 18, 1989	476
<i>PFZ Properties, Inc. v. Rodriguez</i> , 739 F. Supp. 67 (D.P.R. 1990)	479
Judgement of the United States District Court for the District of Puerto Rico dismissing case dated March 9, 1990	493
Sworn Statement of A. Colon Lebron dated March 23, 1990	494
Order of the United States District Court for the District of Puerto Rico denying Plaintiff's Motion for Reconsideration or in the Alternative for Stay of Judgment dated June 15, 1990	500
<i>PFZ Properties, Inc. v. Rodriguez</i> , 928 F.2d 28 (1st Cir. 1991)	502
Judgement of the United States Court of Appeals for the First Circuit Affirming the District Court for the District of Puerto Rico Judgment dated March 18, 1991	512
Order of Court of the United States Court of Appeals for the First Circuit denying Petition for Rehearing dated April 23, 1991	513

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC., <div style="text-align: right;">Plaintiff,</div> <div style="text-align: center;">v.</div> RENE ALBERTO RODRIGUEZ, et al. <div style="text-align: right;">Defendants.</div>	}	CIVIL NO. 87-1915 (HL)
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June 26, 1975

MANUAL OF PROCEDURES FOR
PROCESSING CONSTRUCTION PLANS
AND INSCRIPTION PLANS FOR
URBANIZATIONS

I. Introduction:

This manual of procedures is addressed to providing a uniform procedure at the Regional Offices of the Board, for the consideration of construction plans for residential developments and inscription plans, as delegated to the different Regional Offices.

It covers the administrative and procedural aspects, as well as the technical aspects of the planning laws, standards and regulations.

The manual consists of two parts, the first related to construction plans and the second part related to inscription plans.

FIRST PART CONSTRUCTION PLANS

II. Filing:

A. Procedure

Requests for the approval of construction plans for residential developments (urbanizations) will be filed with the pertinent Regional Office.

In order to process construction plans for urbanizations and inscription plans a request or letter from the

[2]

petitioner or his authorized representative will be accepted, accompanied by the following information:

1. Letter or request from petitioner or authorized representative.
2. Five (5) complete sets of the construction plans of the urbanization, with each sheet signed by the engineer licensed to practice the profession in Puerto Rico.
3. Cost estimate of the project.
4. Stamps from the "Colegio de Ingenieros, Arquitectos y Agrimensores de Puerto Rico" on the basis of \$1.00 for each \$1,000.00 and/or fraction.
5. Copy of title to the property, or certification from the Registry of the Property.
6. Approvals from all pertinent agencies.
 - a. Aqueduct and Sewer Authority
 - b. Water Resources Authority
 - c. Department of Transportation and Public Works
 - d. Department of Municipal Public Works (where applicable)

- e. Intention of accepting sewer work by the municipality in those cases where same have been proposed.
- f. Others related.

7. Agreement or endorsement from titleholders or neighbors of the property to be developed if affected by slopes, the discharge of rainwater or which may be affected by easements. Said endorsement must be notarized being the latter subject to the discretion of the Regional Director, depending on the complexity of the case.
8. Soil test by a company recognized and accredited as such in Puerto Rico.
9. Evidence of compliance with the Environmental Public Policy Act.

[3]

The study of the construction and inscription plans for urbanizations covers the provisions of the Lotification Regulations, the Local Facilities Regulation, the Zoning Regulation, the Regulation for Areas Susceptible to Flooding and the Norms or Criteria regarding the Design of Sewer Systems, Resolution JP-139, slopes, etc.

Prior to the approval of the final construction plans, if there are no problems with the subsoil which warrant a special treatment, a bonafide developer may request a preliminary authorization from the Board and/or the Regional Office to move land. Requests for land movements will not require the cancellation of stamps from the "Colegio de Ingenieros, Arquitectos y Agrimensores de Puerto Rico". Three (3) sets of construction plans must be submitted with the request, accompanied by the following information:

1. Copy of property title or certification from the Registry of the Property.

2. Agreement or endorsement from property owners or neighbors of the property to be developed in cases which may be affected by slopes, the discharge of rainwater or others.
3. Soil test by a company recognized or accredited as such in Puerto Rico.
4. Evidence of compliance with the Environmental Public Policy Act.

The Regional Director may request any additional information which he deems necessary to process the request.

[4]

B. Registry of Requests and Plans

The Regional Planning Office will keep a registry and control book for the cases which will include the following:

1. Date of Receipt
2. Control Number
3. Case Number
4. Name of urbanization
5. Municipality
6. Petitioner
7. Number of Lots
8. Amount of cuerdas to be developed
9. Estimated cost of the project
10. Referral
11. Action
12. Report Number
13. Report Date
14. Observations

C. Card File

A reference card file shall be kept for construction cases, by municipality, name of the urbanization and/or wards and will include as a minimum the following information:

Name of the Urbanization	Control Number
Municipality	Case Number
Road Number	Kilometer
Subject Matter	Ward
Action	Report

The card file may serve to compile information, facilitate the location of the control number and case number. The file will have continuity without regard to the

[5]

year, so that it will have complete information related to the municipalities.

D. Record of the Case by Technicians

Every technician must keep a record of the cases that have been referred to him/her. The record must contain information on the case number, filing date, subject matter, municipality and indicate all action related to the handling of the case and information of interest to prepare the different types of reports, as well as to provide information which may be required at any time.

III General aspects in the Revision of the Case

A. Every project will be preliminarily reviewed to determine the information which is important to initiate the study of the case. A detailed study of the file of the case should be made in order to become familiar with the details of same. All basic information which is not submitted shall be required in writing from the petitioner.

B. Before submitting the construction plans in final form to the consideration of the Board and/or the Regional

Planning Office, the developer or planner must submit to the other governmental agencies concerned the

[6]

final sets of plans which may be required to obtain their final endorsement.

Notwithstanding the above, the petitioner may send the Board an advance copy of said final plans for the preliminary review and comments by the technicians in order to expedite the final review of same before the Regional Planning Office. The review of this advance copy will be carried out after having taken care of the other final cases which have been filed in the section.

It shall not be understood that the delivery of the advance copy constitutes the formal and official filing of the final construction plans, which should be done within the effective term of the preliminary development. The sixty (60) day period which the Board or the Regional Planning Office has to take action on the final construction plans will commence to count as of the date of the formal or official filing of the final construction plans. The Regional Office will remind the petitioner of this provision at the time the advanced copy is received.

C. In the review of the case, the technicians will study the information and plans submitted and the information obtained on the field to determine if the project complies with the regulations in effect and if

[7]

it is technically acceptable. Among the regulations and norms to be taken into consideration are the following:

1. Lotification Regulation #3
2. Zoning Regulation
3. Regulation regarding Local Facilities (Planning Regulation #9)
4. Regulation on Areas Susceptible to Flooding

5. Norms and Criteria for the Design of the Rainwater Sewer System.
6. Norms and Criteria on Slopes
7. Resolution JP-139

In the review of the final plans it shall be necessary to check if these are in agreement with the Preliminary Development which has been approved as well as with any provision of the report of approval.

D. The Construction Plans Review Section will process the technical review of the final construction plans for the development of the land including the community center; the active and passive recreation areas, including the different facilities (parks, courts, etc.) and less important structures which are to be provided, as well as the construction plans of the model areas.

E. The construction plans for the local facilities must be submitted to the consideration of the Interagency Committee for Local Facilities of the Board.

[8]

The planner will file the local facilities plans (3 copies) with the corresponding Regional Office. The endorsements from the pertinent agencies will be processed through the Interagency Committee for Local Facilities.

It will be the responsibility of each Regional Office to send the Committee two (2) copies of the plans filed.

The Committee will send its comments and will be willing to discuss the case with the technician and/or representative of the Office within a period of one (1) week. It will be necessary for the technician and/or representative attending the meeting to be familiar with the details of the case so that the discussion will be clear and effective.

The construction plans for the Cultural Center-Library and the building for local services and ancillary uses shall be

certified pursuant to the regulations in effect, after approval of the corresponding preliminary project.

F. In their review of the cases the technicians will use the verification sheets for construction plans and the verification sheets for local facilities (Appendix I and II).

[9]

A term of two (2) calendar months shall be given to the planner to correct the plans which have been revised. Said period of time will commence to count as of the date of the written notification of same to come and discuss the case at the office. The objections, once the case has been discussed, must be delivered in writing to the planner, including the scheduling of the period of time, leaving a signed copy (designer) in the case.

In the cases of Local Facilities, the period of time shall be one (1) month.

IV. Decisions

Once the review of the plans and other documents in the case has been completed, the case is brought to the consideration of the Director of the Regional Office who may take the following decision:

1. Authorization and/or approval
2. Conditional authorization and/or approval
3. Make the necessary requirements so that the plan and the request comply with the applicable laws, regulations and norms in effect.
4. Deny the request and the plan indicating the reasons why the request and the plan should not be approved and under what conditions it should be approved.
5. Dismiss the case because the petitioner is no longer interested in same or because the

[10]

effective term for the preliminary development has expired.

6. Request additional information.

As established in the planning laws and regulations, official decisions taken by Regional Planning Offices on the cases delegated to same shall be adopted through resolutions.

The Regional Planning Office will accept, modify or reject construction plans for the development of land, including the structures and facilities for the local center, through the adoption of the corresponding resolution, for which it shall take into consideration, among others, the following criteria: their conformity with the planning laws, regulations and norms and with the preliminary development; the recommendations, norms and specifications established in the design of the electric power, water, sanitary and rainwater sewer system, roads, streets and for the engineering work required in the particular development project; implications of the proposed land movement, sectioning, filling, slopes; implications of the manner in which the rainwater of the project are disposed and compliance with the Environmental Public Policy Act.

[11]

V. Agreements

The decisions of the Regional Director regarding the requests and construction plans shall be adopted through reports.

B. Contents of the Reports

The reports on the decisions taken by the Director of the Regional Planning Office must contain the following basic information:

1. Official Letterhead
2. Date of Action

3. Report Number
4. Case Number
5. Title of Report
6. Text, containing
 - a. description of request
 - b. petitioner
 - c. address of project
 - d. general exposition of request
 - e. regulation on which the approval, denial or requirement is based
7. Decision (capital letters)
8. Paragraph on the faculty of the Director of the Regional Office to make the decision
9. Paragraph on effective term
10. Certification of Assistant Secretary
11. Certification Date
12. Official Seal
13. Enclosure (3 pages)

C. Distribution of Reports

Reports shall be prepared in sufficient copies to effect the following distribution:

- Original to petitioner
 - Two copies to file of case
- [12]
- Copy to the Secretary of the Board
 - Copy to the Director of the Operations Area
 - Copy to the Assistant Secretary of the Regional Planning Office
 - Copy to the Local Planning Board
 - Copy to the Municipal Administration
 - Copy to the pertinent Agencies or interested parties

The procedure to issue the resolution shall be the one established by the Office of the Secretary of the Planning Board through the Assistant Secretary of the Regional Planning Office.

D. Distribution of Construction Plans

1. Private Cases

- a. One (1) copy to the petitioner (with cancelled CIAA stamps)
- b. One (1) copy to the Central Office (with seal of approval and signature)
- c. Two (2) copies to the Regional Office (with seal of approval and signature)
- d. One (1) copy to the Municipality

2. Private Cases (Local Facs.)

- a. One (1) copy to the petitioner (with cancelled CIAA stamps)
- b. One (1) copy to the Central Office (with seal of approval and signature)

[13]

- c. Two (2) copies to the Regional Office (with seal of approval and signature)
- d. One (1) copy to the APRP

3. Public Projects

- a. One (1) copy to the agency (with CIAA stamps, if applicable)
- b. One (1) copy to the Central Office (with seal of approval and signature)
- c. One (2) copy to the Regional Office (with seal of approval and signature)

4. Public Projects (Local Facs.)

- a. One (1) copy for the Agency (with CIAA stamps, if applicable)
- b. One (1) copy to the Central Office (with seal of approval and signature)
- c. One (2) copy to the Regional Office (with seal of approval and signature)

E. Cancellation of "Colegio de Ingenieros" Stamps

All plans from private enterprise, as well as those from governmental agencies which are prepared by private planning companies, shall cancel CIAA stamps.

Housing projects originated by CRUV will not cancel stamps, even though the plans have been prepared by private companies. Notwithstanding this, cases of direct purchase (Turnkey-Federal) will cancel the corresponding stamps.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.,
Plaintiff,

v.

RENE ALBERTO RODRIGUEZ,
et al.

Defendants.

CIVIL NO. 87-1915 (HL)

June 26, 1975

**ESTADO LIBRE ASOCIADO DE PUERTO RICO
(COMMONWEALTH OF PUERTO RICO)
OFFICE OF THE GOVERNOR
PLANNING BOARD
SANTURCE, PUERTO RICO**

Second Extension to Report
No. 72 Urb 001F

Case No. 71-083 Urb

May 14, 1976

**RESOLUTION TO RECONSIDER APPROVAL OF
ALTERNATE PRELIMINARY DEVELOPMENT FOR
TOURIST-HOTEL-RESIDENTIAL PROJECT WITHIN
THE DISTRICT OF TORRECILLA BAJA, DE LOIZA**

The Planning Board of Puerto Rico at a meeting on the 24th of July 1974 approved an alternate preliminary development proposed by P.F.Z. Properties, Inc. for the development of an area of land comprising 266.41 cords, originating from a estate of greater extension located in the district of Torrecilla Baja, Municipality of Loiza; such approval being subject to the conditions, opinions and other requirements established in the First Extension of the above captioned Report No. 72-Urb 001F.

On August 21, 1974 a motion was filed before this Board by Attorney Pedro J. Saade in representation of Mr. Santana Pizarro Romero and other residents of the area where the property to be developed is located with the purpose of reconsidering the previous agreement.

The petitioners considered themselves as affected parties due to the fact that they reside in the area where the property to be developed is located, this implicating relocation of their residences and alteration of their way of life.

[-2-]

Having the proposing party in this case, P.F.Z. Properties Inc. been notified of the application for reconsideration filed before this Board, the aforementioned firm proceeded to file a writ of opposition to the Reconsideration Motion, being this document filed by its attorneys Victor Gonzalez Mangual and Rolando Martinez Rivera of Rua, Mercado and Gonzalez, Esquires.

In view of the allegations filed before this Board by the parties in interest, it was agreed to hold an administrative hearing of quasi-judicial nature which was carried out on the 12th, 13th, 14th, 18th and 20th days of November 1974 on the 8th floor of the North Building of the Minillas, Santurce Government Center.

From the transcript of the record, the evidence submitted, the case proceeding, the Report of the Examining Officer, and the reevaluation of the case the following findings of fact and conclusions of law were made:

I. Findings of Fact:

1. On October 17, 1969 the Board by means of its Report No. 69-001F DENIED Consultation No. 69-002U submitted by Puerto Rico Properties Inc. (at present P.F.Z. Properties, Inc.) concerning a proposal for a project for a tourist hotel in a estate comprising 1,200 cords of land located in the district of Torrecilla Baja de Loiza. Among the

elements taken into consideration for the aforementioned denial by this Board, the following were included:

a - The vast majority of the land comprising the total extension of the estate in question is subject to inundation due to the overflow of Grande de Loiza river.

b - There was no financing program in existence, neither was this plan in preparation, or a construction program to control

[-3-]

such floods on the beforementioned date.

c - All of the area comprising the district of Torrecilla Baja de Loiza and part of the area known as Vacia Talega is not ready for urban development due to lack of the substructure necessary for the feasibility of its development, this area being considered as isolated.

d - A great part of the referred estate is covered by groves, lagoons and canals which must be preserved for the purpose of protecting the ecology of the area and the production of nourishment for marine life.

2. Puerto Rico Properties Inc. (at present P.F.Z. Properties Inc.) requested a reconsideration of the above-mentioned denial and proposed a formula to initiate part of the project subject to the progress of the design and the preparation of the blueprints for the construction work which would control the floods in the area. A proposal was made for the development of 600 cords, the nearest to the ocean, in two stages: a first stage which would enclose 200 acres together with a new access road, from Boca de Cangrejos bridge to the West boundary of the property, these works to be paid with funds of the proposing corporation. The second stage would comprise the remaining 400 acres, of the 600, the nearest to the coast; however, at the time of submitting the blueprints for the development of these 400 acres, the first blueprints for the control of inundations would be finished, as well as the

proportion allocation of funds for the works indicated in the mentioned blueprints.

3. During the course of its meeting on October 16, 1970 the Board APPROVED, by means of First Extension to Report No. 69-001F, Consultation No. 69-002U for the location and use of land for tourist

[-4-]

hotel plans from part of the mentioned estate this subject, among other, to the following requirements and conditions:

a - the location of the tourist hotel project would be settled in an area of 200 cords, according to what was indicated in a sketch attached to the before mentioned report, the first developing stage comprising the 100 cords nearest to the Northeast.

b - According to the proposal contained in a letter dated April 27, 1970, the Board accepted the offering made in such letter by means of which (as well as in subsequent conversations with members of the Planning Board) the firm known as Puerto Rico Properties Inc., by its President Mr. Louis Puro, agreed to build a provisional access from the Boca Cangrejos bridge to the West boundary of the property, in accordance with the specifications and cost figures prepared on that date by Autoridad de Carreteras (Roads Authority) which amounted to \$1,500,000.00.

c - The Planning Board would determine the proportional part to be provided by Puerto Rico Properties, Inc. for the purpose of carrying out the works designed to control the inundation of the area, having previously effected the corresponding study. As a prerequisite for the approval of the preliminary development, duly registered documents should be filed, these documents stating that the whole of the estate of approximately 1,200 acres proportionately liable as to the corresponding part of the payment that the proposing party would allocate for the works to control inundations in the area.

d - The preliminary development should be prepared in coordination with the recommendations made by Negociado de Planos Reguladores (Commission for the Regulation of Plans).

[-5-]

4. On May 21, 1971 the Plan for the Use of Land and Transportation for the Metropolitan San Juan area, hereinafter referred to as the "Plan", was approved. This Plan establishes the utilization viewed for the district comprising the area to be developed by the approved project in accordance with the studies effected up to that time. The Punta Vacía Talega section to the West has been zoned for recreation, open areas and conservation, and the section to the East has been zoned for commercial use, predominantly for hotel use with recreation along the coastal zone. The section heading South has also been zoned for commercial use, predominantly for hotel use, maintaining recreation, open spaces or conservation areas between the main road and the seaside. The Plan also contemplates a road system adapted to the outline of land use registered in the Plan for the area in question.

5. On December 27, 1971 the Board, by means of its Second Extension to Report No. 69-001F concerning consultation No. 69-002U issued a clarification of facts concerning paragraph 3 of page 2 of the mentioned report with the purpose of determining more precisely the participation of Puerto Rico Properties, Inc. in the cost of the works for the control of inundations, and the timing for the availability of the funds, as well as the guarantee for the corresponding payment.

6. On July 1, 1972 the Board, by means of Report No. 72 URB 001F approved Case No. 71-083 URB for the Preliminary Development of the First Stage of the tourist-residential-hotel project proposed for an area of approximately

192 acres located in the district of Vacía Talega, Barrio Torrecilla Baja de Loiza. This decision was adopted by the Board after having effected several

[-6-]

studies concerning the alternatives for the development of the area which, at that time, were considered to be feasible taking into consideration the prevailing conditions. This approval by the Board stated that it was only authorizing the road system with street sections, and the distribution and location of land use with the corresponding densities. It was also stated that the Board was not authorizing a sub-division of lots or accepting any building proposals, and that the lots to be subdivided would allow free access to the beach, particularly to the area comprised by 600 meters in length to the West of the property. It was furthermore stated that a strip of land no less than 50 meters in width would be maintained free of construction from the seaside all along. In compliance with the recommendations and endorsements of the various agencies involved, all the facilities and public services required by the development project would be the responsibility of the proposing party.

7. On June 29, 1973 P.F.Z. Properties, Inc. submitted to the consideration of this Board an alternate, preliminary development for the first stage of the tourist-residential-hotel project in an area of land comprising 266.41 acres in place of the one that had been previously approved on June 1, 1972. Together with the preliminary development proposal, a statement concerning environmental conditions was circulated among the government agencies involved.

8. The Environment Control Board (Junta de Calidad Ambiental) proceeded to hold public hearings in connection with the above referred statement on the 14th, 15th, 21st and 22nd days of January 1974. The Environment Control Board (Junta de Calidad

[-7-]

Ambiental) agreed to endorse the project, and to file before this Planning Board its comments and recommendations in connection with the mentioned statement, and among which the following are included:

a) The Environment Control Board recommends the approval of the first stage of the proposed project.

b) Any construction which may significantly affect the natural conditions of the surrounding grounds will not be allowed.

c) The access road from the Boca Cangrejos bridge as well as the passage, rest and recreation areas to be provided shall be designed in such manner that they have the minimum effect upon the groves.

d) The above referred access road would not constitute an obstruction to the passage of waters from the Rio Grande de Loiza river.

e) A DIA will be prepared as to the type of access to be built, its route and other construction details. Such DIA will be prepared and circulated by Autoridad de Carreteras de Puerto Rico (Puerto Rican Road Authority).

f) No flood control works which may significantly affect the inundation levels of residential areas subject to the effect of Rio Grande de Loiza will be carried out, and the corresponding considerations for these purposes must be submitted.

g) The project designer will submit to the Planning Board the identification of archaeological zones, and this Board in conjunction with the Institute of Culture will determine what shall have to be preserved.

h) No pesticides or chemical compounds for the

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[-8-]

of insect extermination, which may affect the natural life of the groves area shall be sprayed, as these chemicals may spread and affect such areas.

9. On July 24, 1974 this Board, by means of its First Extension to Report No. 72 URB 001F approved the preliminary development under Case No. 71-083 URB which contained the first stage of the tourist-residential-hotel project to be developed in the previously mentioned area. The alternate, preliminary development was approved after the Board had evaluated the facts submitted by the proposing party in compliance with the established public policy, and also in view of the considerations and recommendations of the pertinent agencies involved, such as the Statement of Environment conditions and the studies effected of the area in question. The mentioned development views the utilization of the area known as Punta Vacia Talega for tourist-residential-hotel use, the hotel area reaching toward the section comprising the grounds facing the cove located West of the mentioned Punta, and the tourist residential area reaching toward the Northeast section of it. Between the ocean zone and the development, a free access strip shall be provided as a pedestrian walk way. To the rear of the development the main access road shall be located from where secondary roads will stem to provide communication by vehicle to the various hotel and tourist residential facilities within the development. The breakdown by use of grounds of the approved development, as well as the conditions and requirements under which the project had been authorized are contained in the resolution embraced by the First Extension to Report No. 72 URB 001F dated July 24, 1974, in accordance to what has been stated at the introduction of the present document.

[-9-]

10. The alternate, preliminary development approved by this Board at its meeting on JULY 24, 1974 for the section of land to be developed is not totally in accord with the Plan

for Use of Land and Transportation in force for the Metropolitan San Juan area. The development does not conform with the Plan in that the former does not reflect adequately the use of the land proposed in the Plan, predominantly for hotel use, recreation, open spaces and conservation areas, and in that the mentioned development includes structures between the main road and the cove which lies West of Punta Vacia Talega.

11. Of all the petitioners only the Santana Pizarro and Federico Escalera families reside on the premises of P.F.Z. Properties, Inc. Therefore, they could face relocation when the land is developed.

12. The rest of the petitioners reside in sub-divisions known as Piñones and Las Torres respectively, which are located approximately 4 miles from the project to be developed.

13. In view of the separation between the P.F.Z. Properties, Inc. project and the Piñones and Las Torres subdivisions, neither is dislodging conceivable, nor adverse effects to these families caused by the proposed development.

Having analyzed the preceding Findings of Fact in accordance with the laws and regulations in force we have arrived at the following

CONCLUSIONS OF LAW:

1. This Planning Board was created under Law 213 of May 12, 1942, as ammended by 23 LPRA Section 1 and subsequent.

[-10-]

By means of Article 3 of the beforementioned Law this agency has been vested with sufficient powers for the general purpose of guiding the development of Puerto Rico in a coordinate, adequate and economical way, so as to encircle, in accordance with present and future needs, as well as with

human, physical and economic resources such development to ensure the best possible health, safety, morality, neighborly living, prosperity, defense, culture, economic stability and general welfare of present and future inhabitants, accomplishing also the necessary efficiency and economy in the development process, in the distribution of population, in the use of land, and in the public improvements which tend to create favorable conditions leading to such ends.¹

2. Article 6:01 annexed to Law 213 supra, by Law 116 of June 29, 1964 23 LPRA, Section 6 Supl. empowers this Board to act as a regulating authority in Puerto Rico, and to pass and enforce the regulations authorized by law; to adopt zoning maps, and recommend to the Governor and the Legislative Assembly a four year economic program, submitting a yearly economic report to the Governor and to the Legislative Assembly.

When exercising such duties the Planning Board acts in two capacities or with two powers;

a) a quasi-legislative one, as Regulator of Maps and Zoning; and,

b) a quasi-judicial one when taking decisions on cases and issues concerning use of land, construction works, sub-divisions and other, in which citizens or private concerns may be involved or affected.

3. The petitioners, considering themselves as affected parties in this case have requested that this Board reconsider

[-11-]

its decision to approve a preliminary, alternate development for a sub-division (urbanización) just as this term is defined in the Planning Laws and Regulations.

4. The Planning Board has the ability to understand and determine on applications for reconsideration, provided that any of the affected parties file a motion or appeal within the first 30 days from the deposit in the mails of the notice

concerning the case upon which reconsideration is requested, 23 LPRA Section 25. Furthermore, it has the power to revise its own regulations at any given time to clarify matters or ammend such regulations, independently from what it is established by Law 213 of 1942.

5. The petitioners have qualified as affected parties in accordance with the applicable laws in force, also having filed the pertinent reconsideration motion before this Board, within the period of time stipulated by the law.

6. The preliminary alternate development approved by this Board on July 24, 1974 does not conform with the Plan for Use of Land and Transportation of the Metropolitan San Juan area, according to what has been previously specified in Paragraph 10 of the Findings of Fact.

7. When approving the preliminary, alternate development for a tourist-residential-hotel project in Vacía Talega on July 24, 1974, this Board complied with the substantial and procedural requisites of Law No. 9 of June 18, 1970, as amended, which law is known as Law on Public Environmental Policy.²

Therefore, in view of what has been exposed heretofore, both in the Findings of Fact Statement and in the Conclusions of Law, and by virtue of the powers conferred upon this Board by Law 213

[-12-]

of 1942, as amended, (at present Law No. 75 of June 24, 1975) the Board adopts the following decision:

To dismiss the petitions of the affected parties, with the exception of the noting on the Preliminary Alternate Development and its non-conformity with the Plan of Land Use and Transportation of the Metropolitan San Juan area.

The approval for the use of land for the tourist-residential hotel project stands, the project consisting of 8,600 hotel

rooms and 8,135 basic living units, together with the corresponding commercial, recreation and education facilities, comprising a total of 266.41 acres. This decision authorizes only the development of a first section of the project formed by approximately 106 acres in that section of the estate which, because of its topographical characteristics and its location—generally out of the valley where inundations may occur due to the avenues of Rio Grande de Loiza—make it feasible immediately, since the necessary substructure can be provided.

Furthermore, in order to conform the project to the Findings of Fact and Conclusions of Law, the project shall have marked tourist-hotel characteristics as to utilize all the potential of the area where it is located, to wit, the beaches and groves, and to stimulate the creation of permanent jobs. The residential units shall be integrated to the design of the project and shall function in coordination with the hotel areas, so as to complement and support them.

For these purposes, and after complied with the procedures related to the operation and design of the project, according to the development approved herein, the proposing party shall obtain

[-13-]

favorable endorsement from the Tourism Development Company (Compañía de Fomento de Turismo).

THEREFORE, the Alternate Preliminary Development approved on July 24, 1974 is hereby AMMENDED, so that it remains within the sections described hereinafter, in accordance with the specifications and criteria which are listed for each of the mentioned sections:

I. FIRST SECTION

A) Land Development

This will provide for the development of 106 acres of land located in the North District of the main estate adjacent to the Atlantic Ocean, between Punta Vacía Talega and the district of Arenas. See attached sketch.

This part of the estate is mostly located out of the groves area with elevations superior to inundation levels. The authorization for this first section covers 2,000 hotel rooms and 2,000 residential units, which will be constructed in accordance with the procedures in force, and after the conditions specified hereinafter are complied with.

1) The internal urban design of the blocks included in the alternate preliminary development within this first section shall follow the guidelines established in this report.

2) Since the area in which the project will be located, i.e., within Barrio Torrecilla Baja of the Municipality of Loiza, does not have the necessary substructure to facilitate the project, all the facilities and public services, such as water, electricity, sewer system, etc. will be carried out for the account of the proposing party, in accordance with the recommendations of the

[-14-]

government agencies involved.

The removal of dirt and the displacement of water and affluent waters from the sanitary sewer system will be carried out in such manner so as not to affect significantly the ecology of the surrounding area.

The preparation of the final blueprints for any of the works related to this project will be made in compliance with the conditions and requirements established by this Board and other government agencies involved.

3) The immediate access to be provided for this project will be of a provisional nature, utilizing the existing road and maintaining, as much as possible, the present alignment, right of way and level.

4) The capacity of vehicle traffic determined by the Department of Transportation and Public Works (Departamento de Transportación y Obras Públicas) for this access of provisional nature as part of this project, utilizing the alignment and right of way of the existing road, will be based on the number of residential units and hotel rooms authorized progressively for construction by the Department of Regulation and Permits (Administración de Permisos y Reglamentos) until reaching, without exceeding, the total number of units authorized in this first section. Once this capacity has been reached, considering the volume of traffic generated by the mentioned units, authorized by the Department of Regulations and Permits, and not having reached the total number of units allowed, only additional permits will be granted in proportion to the capacity added to the provisional access by means of improvements, or by the construction of any other alternate access road.

[-15-]

5) The road to be designed and constructed with the required capacity to satisfy the volume of traffic generated by the total amount of hotel and residential units authorized under this report, according to what has been specified in Paragraph No. 4, shall allow the necessary open spaces or areas, conservation areas and recreation areas to be served along its extension, and shall also contribute to protect the nearby groves and to avoid that the works constitute an obstruction to the free passage of waters originating from the inundations of Rio Grande de Loiza.

6) It will be the responsibility of the developer to provide the maintenance and conservation of the access road during the construction of the development project. For this purpose, the developer shall render a bond for the maintenance and conservation of the access road, according to what the Department of Transportation and Public Works determines.

7) A strip of land adjacent to both the seaside and the land will be maintained as an open area, as indicated in the alternate preliminary development approved by means of this resolution. This strip of land will be free of structures with the exception of those commonly related with developments of public beaches and park areas, for example, benches, arbors, showers, dressers and pedestrian walk ways. When preparing the blueprints for registration this strip shall be labeled as open area. The sections of this strip of land to be transferred by means of public deed for public use will be credited as part of the land for neighborhood facilities required by Planning Regulation No. 9 (Regulations on Adjacent Facilities), and these strips will be labeled, in addition to the before mentioned sign, "For Public Use" ("Dedicadas a Uso Público"). The

[-16-]

developer shall retain title of those open spaces which are not credited as part of the adjacent facilities.

8) In addition to those strips of land to be transferred *** dedicated for public use, adjacent facilities, with its corresponding lots, will be provided at the blocks for residential use p*** dominant in the alternate preliminary development to be approved***. This public use area will be in proportion to the number of residential units to be constructed in each block. The limit*** the credit for the whole of these areas will not exceed 4 acre*** as part of the land to be computed among the required for the *** project's adjacent facilities. This in no way will restrain t*** developer of the project from including, on his own account, i*** so desired, a greater area for such ends in each residential b***

9) The facilities for active recreation required by Plann*** Regulation No. 9 may be substituted by facilities related to t*** development of bathing resorts, such as showers, dressers, restrooms, parking areas, etc. These shall be located in the areas to be transferred for public use which face

the beaches at the *** cove to the West of Punta Vacía Talega, and must contribute to *** the enjoyment of recreation by the general public at those bea***

10) Premises will be provided for local commercial use, in accordance with Planning Regulation No. 9, as part of the main building or annexed to same and which are mainly for hotel use.

11) Prior to the initiation of construction work for the project, the developer shall submit to this Board a program and schedule of the development construction works to be carried o*** covering the residential units and hotel rooms of this first section, as well as the information concerning the arrangements

[-17-]

that have been made to provide the substructure and the required basic services.

12) The developer will submit as well, for the consideration of the Department of Permits and Regulations (Administración de Reglamentos y Permisos) a program or schedule for the development and construction of the project's adjacent facilities, so that when the first building is occupied the dwellers the minimum required facilities.

13) Since this project is to be developed as a tourist-residential-hotel complex the only separations that will be approved will be those that conform with the requirements of Planning Regulation No. 9 (Adjacent Facilities), and those essential to facilitate its financing. These partitions will have to adjust as to limits, development and use with what has been established in the internal preliminary development to be approved by Administración de Reglamentos y Permisos with the endorsement of Compañía de Fomento de Turismo (Tourism Development Company) for the different blocks in the first section of the development approved by this resolution.

B - DESIGN AND CONSTRUCTION OF BUILDINGS

1. Buildings will be designed and constructed to include the number of residential units and hotel rooms authorized by means of this resolution, as well as other which may be converted from hotel into residential as specified hereinafter.

2. Conversion of hotel rooms into residential units.

A maximum of 1,500 hotel rooms will be allowed for conversion into residential apartments under the concept known as "condo-hotel", provided that these are distributed proportionately among the blocks and that the remaining 500 rooms are distributed among the blocks to be developed for hotel use predominantly. For this conversion each hotel room will be equivalent to 0.4 basic residential unit. All of the condo-hotel units will be for exclusive hotel use as the concept of this development is of a tourist hotel nature.

3) Height of Buildings in the Seaside Area

The height of the structures to be constructed on the lots located near the seaside will be limited to that which produces the minimum of shade in the beach area and will conform to the applicable regulations.

4) When designing the residential buildings the location and development of the adjacent facilities to be provided shall be taken into consideration.

5) Construction area, occupancy area, yards, parking and other regulations.

For all the dispositions regulating the construction of buildings, which are not referred to individually in this resolution, the ones established by the Zoning Regulations will be observed for the residential district zoned R-5, as well as any other applicable regulations in force.

6) Certification of Blueprints

Every blueprint certification shall clearly state that all the requirements established by this Board of Planning and/or any other agencies involved have been complied with.

C - Other Conditions

1) Prior to the authorization of any subdivision or building construction a plan endorsed by the Environment Control Board shall be filed.

This plan will provide for the collection and disposal of solid waste materials or garbage originating from the project.

2) No pesticides or chemical compounds for the purpose of terminating insects and which may affect the natural life of the groves area shall be sprayed, as these may spread and affect the mentioned areas.

II) SECOND SECTION:

For further consideration of the concept of the development for this second section, which is to be carried out on the re*** 266 acres and which will be formed by 6,600 hotel rooms and 6,*** residential units, with the corresponding commercial, recreati*** institutional and educational facilities, the following condit*** are hereby established:

1) Subsequent to the presentation by the proposing party*** the program and construction schedule for the residential unit*** and hotel rooms for the first section as specified in Paragraph*** of page 21 of this resolution, the Board will determine the ti*** for the subsequent procedures to initiate the considerations f*** the second section of this project.

2) The previously mentioned decision will be subject to *** substantial progress of the construction works and to evidence that the remaining part of the first section will be finished.

3) Evidence will be provided that the necessary sub-struct*** for this section will be available either because the developer will provide for same, or because the agencies and public cor***tions have made programming arrangements for it, according to priorities for public investment in force at that time.

4) In the event that the access for the first section, subsequent to its improvement, is being fully utilized when finishing the development of that section, it is hereby noted that a new access for this second section shall be constructed which shall have sufficient capacity. This shall be done either by improving the road and the bridge in the Boca Cangrejos section so as to connect with State Road No. 487, or by constructing a new road with its bridge over the Rio Grande de Loiza so as to connect with State Road No. 188 in the Municipality of Loiza. The design of this access will follow the guidelines established in Paragraph 5 of Page 18.

5) A hydraulic study shall be made showing, by means of technical data, that the increase of inundation levels caused by the withdrawal of the valley subject to inundation of the land within this section will not have a significant adverse effect in surrounding areas.

Such study shall be submitted to the Department of Transportation and Public Works (Departamento de Transportacion y Obras Publicas) in order to obtain recommendations and/or comments from that agency, prior to any approval.

6) To obtain the permits required by law or by regulations related to the development of this land.

7) To prove that the construction of this second section will not significantly affect the natural conditions of the surrounding areas.

8) The design pattern of this section will be in harmony with the pattern used in the first section in terms of interrelation and functioning by blocks, applicable to the hotel, residential, tourist, commercial and adjacent facilities.

9) The pattern to be used for the various blocks of hotel, residential and commercial units to be developed in the second section will be oriented in its design toward the new access which shall have been approved by the Department of Transportation and Public Works.

10) In accordance with what has been established in previous reports on this case, this Board of Planning will determine the proportional share of contribution to be made by the proposing party for the works of inundation control in the area in question, once the corresponding studies have been effected.

This Board when amending the Preliminary Alternate Development approved on July 24, 1974 and when APPROVING now this preliminary alternate development has concluded that the mentioned development of the first section, within the illustrated limits, does not have a significant impact upon the environment as it lies out of the groves area, and is not subject to inundations, as well as that it will maintain vacant strips and open areas adjacent to the sea shore, and that it will preserve the areas of archaeological value, as well as because of other considerations in connection with the provision of public services.

This Board wishes to state that having established in this report the conditions that will regulate the development of the second section, and in the event that these conditions are complied with in due time, as well as those appearing in the DIA prepared for this project which proves that there will not be a significant adverse impact upon the surrounding areas, the Board is aware that the development of the referred second section would be feasible from the standpoint of environment conditions. In view of the preceding the Board

determines that to the effects of this decision, it has complied with Law No. 9 of June 18, 1970 (Law on Public Environmental Policy).

By these presents and taking into consideration what has been previously exposed, and by virtue of the laws, regulations and norms of planning of Puerto Rico, this BOARD approves by means of this Second Extension to Report No. 72 URB 001F of Case No. 71-083 URB the alternate preliminary development attached hereto for the tourist-residential-hotel project "Vacía Talega" in Barrio Torrecilla Baja de Loíza with the purpose of amending the preliminary development approved on July 24, 1974, so that the mentioned development is effected by the sections which have been described heretofore, and that they are developed in accordance with the regulations and basis listed in this report for each of the beforementioned sections.

This agreement authorizes the preparation of the construction blueprints for the subdivision works of the first section according to the alternate preliminary development attached hereto, and it will be in force for a period of a year from notice date. It is understood that if the mentioned blueprints are not submitted within the stipulated period of time, the case will be dismissed and filed for all legal effects.

Furthermore, the internal preliminary development of the blocks shall be submitted, within the before mentioned period of time, to the Permits and Regulation Administration, in accordance with the construction schedule which shall have to be submitted by the proposing party as has been previously specified.

WHEREFORE, all the requirements established in Report No. 72 URB 001F and subsequent extensions, which are not altered by the present one remain in effect; and that the proposing party shall notify to this Board within a period of 3

months any transaction having to do with the land in question, so that the Board may effect the corresponding annotations in the case file.

IT IS FURTHERMORE ORDERED that conditions not appealed within the period of 30 days from notice date, shall be in effect for all the subsequent action related to the development and construction of this project. This Board understands and it is hereby expressed that this approval has been granted in consideration of all the proposals and conditions mentioned in this document, and that since these proposals and conditions make the project feasible, any request for modification originating from the proposing party will imply the complete reviewing of the project concerning the use, density and programming of same.

I CERTIFY that the preceding is an exact and faithful copy of the report adopted by the Board of Planning of Puerto Rico, at a meeting held on May 14, 1976, and for the knowledge and general use I issue these presents to notify the parties, affixing my signature and the official seal of this Board in the city of SanJuan, Puerto Rico, on May 14, 1976.

(Signed):

TERESA BIAGGI LUGO
Secretary

(Seal of the Board of Planning
of Puerto Rico reading):

ESTADO LIBRE ASOCIADO DE PUERTO RICO
OFFICE OF THE GOVERNOR
BOARD OF PLANNING

SIGNATURE OMITTED IN PRINTING

BERLITZ TRANSLATION SERVICE

A DIVISION OF THE	316 AVENIDA DE DIEGO
BERLITZ SCHOOLS OF	SANTURCE
LANGUAGES OF	PUERTO RICO
AMERICA, INC.	

CERTIFICATION

This is to certify that the attached translation (No. 76-51) is to the best of my knowledge and belief an accurate and true rendition from Spanish into English of Resolution of the Planning Board of Puerto Rico dated May 14, 1976.

May 24, 1976

José Alvaríño
Regional Director

JA:abc

SIGNATURE OMITTED IN PRINTING

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.,	}	CIVIL NO. 87-01915 (HL)
Plaintiff,		
vs.		
RENE ALBERTO RODRIGUEZ,		
et al.		
Defendants.		

BASORA & RODRIGUEZ

ENGINEERS, ARCHITECTS, PLANNERS,	701 PONCE DE LEON AVE. CENTRO DE SEGUROS BLDG. SUITE 406 — TEL. 725-9030 MIRAMAR, SAN JUAN, P.R. 00907
--	--

February 22, 1982	VICTOR M. BASORA, P.E. LUIS M. RODRIGUEZ, P.E.
-------------------	---

Edmundo Colón Arizmendi, P.E., Administrator
Regulations and Permits Administration
Minillas Government Center
North Building
Santurce, Puerto Rico

Attention: Jorge Colón Miranda, P.E.,
Chief Technical Review Office

Re: Vacía Talega Project
Barrio Torrecillas Baja
Loíza, Puerto Rico
Case No. 71-083 Urb.

Dear Mr. Colón Arizmendi:

We submit for your approval five (5) sets of copies of the
Construction Plans for Block No. 2 of the project referred to,

which have been prepared following the recommendations contained in the ARPE Resolution approving the Internal Preliminary Development [*Desarrollo Preliminar Interno*] of the Blocks. Given the size and complexity of the project, we have thought it convenient to prepare, in the first instance, the construction plans for the development works of that Block as a first stage of the first section approved for it.

At the same time, we are submitting the preliminary designs for the buildings to be constructed in the aforementioned Block, with the aim of obtaining from your agency the comments and recommendations that would allow us to certify the final plans for them, after obtaining approval of the development works.

We would like to inform you that despite our diligence in seeking to obtain the endorsements of the Aqueduct and Sewer Authority (A.A.A.), and of the Electric Energy Authority (A.E.E.) for the off-site works required to serve the project in its totality, and for the first stage of it in particular (Block No. 2), it has not been possible for us to present the final construction plans for those off-site works. This is because even though the endorsements of the A.A.A. and the A.E.E. were requested at the end of the 1979 year (more than a year before the date on which that Administration authorizes preparation of the construction plans), the final recommendations of the

0000043

Edmundo Colón Arizmendi, P.E., Administrator
Regulations and Permits Administration
Page (2)

February 22, 1982

agencies mentioned were not received by us until November 3, 1981, in the case of the A.A.A., and on January 14, 1982, in the case of the A.E.E. As you will understand, the planning and coordination of the facilities referred to and of the off-site works are very complex, and it was humanly and technically impossible to complete that work in the short time (little more than a month) remaining between the date on

which the last of the endorsements was received, and the date on which we had to present the construction plans. Nevertheless, those construction plans are now being prepared, and at the appropriate time we will submit them for the consideration and endorsement of the agencies mentioned. In the same fashion, we are submitting for their endorsement to the A.A.A. and to the Department of Transportation and Public Works the construction plans for the development works of Block No. 2. As soon as we obtain those endorsements, we will submit them for ARPE's approval.

A similar situation to that described above with reference to the agency requirements, obtains with project access construction plans (State Road No. 187) from Boca de Cangrejos, which [plans] we understand are being prepared by the Highways Authority.

We will thank you for the prompt consideration by ARPE of the construction plans for the development works for Block No. 2, and the advance approval of the general earth-moving works for that Block, as presented on sheet No. 9 of the Construction Plans submitted.

Cordially,

BASORA & RODRIGUEZ

[Signature]

Luis M. Rodríguez

cc: Mr. Jack Katz, President

P.F.Z. Properties, Inc.

Enclosures

[Time stamp, upside down]

FILINGS

REGULATIONS AND PERMITS

ADM.

Feb. 23 10:06 AM '82

0000044

SIGNATURE OMITTED IN PRINTING

CERTIFICATION OF TRANSLATION JUNE 6, 1989

I hereby certify that the following translations are correct translations to the best of my knowledge and belief. Documents covered: 004074-004081, 0000043, 0000044, 0002880, 0002876, 0002877, 0002082, 0002873, 0002874, 0000235, and 0000014.

SIGNATURE OMITTED IN PRINTING

Alicia Betsy Edwards, Ph.D.

Certified Court Interpreter

Administrative Office of the U.S. Courts

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.,	}	CIVIL NO. 87-1915 (HL)
Plaintiff,		
v.		
RENE ALBERTO RODRIGUEZ,		
et al.		
Defendants.		

[Logo]

ARPE

[Left margin]

Commonwealth of Puerto Rico, Regulations and Permits Administration, Minillas Government Center, North Bldg./Box 41179, Minillas Sta., Santurce, Puerto Rico 00940

March 24, 1982

[Trace of illegible time stamp]

Luis M. Rodríguez, P.E.
Basora & Rodríguez
Ave. Ponce de León 701
San Juan, Puerto Rico 00907

Re: Case No. 71-083 Urb.
Vacía Talega Project
Loíza, Puerto Rico

Dear Mr. Rodríguez:

We refer to your communication of February 22 of this year, in which you submit to the consideration of this Administration the preliminary designs of the buildings to be located in Block No. 2 of the project referred to, as well as the construction plans for the urbanization works to serve it.

We are hereby returning the plans that correspond to the preliminary designs, because they do not fit the requirements of the report of February 24, 1981 approving the alternate preliminary development for the first section of the proposed project.

We would like, furthermore, to inform you that the construction plans submitted have been referred to the consideration of the Regional Office of this Administration at Carolina.

Cordially,

[Signature]

Jorge Colón Miranda
Assistant Administrator
Technical Review Office

0002880

SIGNATURE OMITTED IN PRINTING

CERTIFICATION OF TRANSLATION JUNE 6, 1989

I hereby certify that the following translations are correct translations to the best of my knowledge and belief. Documents covered: 004074-004081, 0000043, 0000044, 0002880, 0002876, 0002877, 0002082, 0002873, 0002874, 0000235, and 0000014.

SIGNATURE OMITTED IN PRINTING
Alicia Betsy Edwards, Ph.D.
Certified Court Interpreter
Administrative Office of the U.S. Courts

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.,
Plaintiff,

vs.

RENE ALBERTO RODRIGUEZ,
et al.

Defendants.

CIVIL NO. 87-01915 (HL)

[Logo]

ARPE

[Left margin]

Commonwealth of Puerto Rico, Regulations and Permits
Administration, Minillas Government Center, North Bldg./
Box 41179, Minillas Sta., Santurce, Puerto Rico 00940

May 22, 1984

Date

Basora and Rodríguez

Avenida Ponce de León 701

Edificio Centro de Seguros

Suite 406, Miramar

San Juan, Puerto Rico 00907

Reference: Case Number 71-083 URB

Vacía Talega

Bo. Torrecilla Baja

Loíza, Puerto Rico

Dear Sir:

[Illegible hand note]

We refer to the construction plans prepared for the urbanization works to serve the project that were submitted for the consideration of this Administration for final review.

We hereby wish to inform you that on March 28, 1984, this Regulations and Permits Administration adopted the Regulations for the Certification of Construction Projects (Planning Regulation Number 12), with the goal of establishing a system of certification of construction plans, including among others the facilities for urbanizations.

That regulation took effect on May 8, 1984, although a grace period is granted until August 5, 1984, during which time availing oneself of the certification proceeding will be optional in the case of projects of construction of urbanization works.

I will be grateful if you acknowledge receipt of this letter, and if you will inform us of your preference in the matter.

Cordially,

[Signature]

Juan A. Maldonado, P.E.
Assistant Administrator for
Regional Operations

Enclosure

0000235

SIGNATURE OMITTED IN PRINTING

CERTIFICATION OF TRANSLATION JUNE 6, 1989

I hereby certify that the following translations are correct translations to the best of my knowledge and belief. Documents covered: 004074-004081, 0000043, 0000044, 0002880, 0002876, 0002877, 0002082, 0002873, 0002874, 0000235, and 0000014.

SIGNATURE OMITTED IN PRINTING

Alicia Betsy Edwards, Ph.D.

Certified Court Interpreter

Administrative Office of the U.S. Courts

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.,
Plaintiff,

vs.

RENE ALBERTO RODRIGUEZ,
et al.

Defendants.

CIVIL NO. 87-01915 (HL)

701 PONCE DE LEON AVE.
CENTRO DE SEGUROS BLDG.
SUITE 406 — TEL. 725-9030
MIRAMAR, SAN JUAN, P.R. 00907

VICTOR M. BASORA, P.E.
LUIS M. RODRIGUEZ, P.E.

[Time stamp]

786 JAN 27 PM 2:03.

RECEIVED—MAIL

A.R.P.E.—C.G.M.

January 27, 1986

Lionel Motta, P.E., Administrator
Regulations and Permits Administration
Minillas Government Center
San Juan, Puerto Rico

Re: Vacía Talega Project
Barrio Torrecilla Baja
Loíza, Puerto Rico
Case No. 71-083 URB.

Dear Mr. Motta:

We refer to our communication of February 22, 1982, copy of which we are enclosing, with which we submitted to ARPE Construction Plans for the development works of

Block No. 2 of the first section approved for development by the Planning Board for the Vacía Talega project.

With that communication we also requested the advanced approval of the general earth-moving works for that block, and we submitted the preliminary designs of the buildings to be constructed in that block, for the purpose of obtaining from ARPE comments and recommendations which would allow us to certify the final plans for them.

By means of a communication from ARPE, dated March 24, 1982, copy of which is enclosed, the plans of the preliminary designs corresponding to the buildings were returned to us, because ARPE understood that their processing was premature, without the development works yet having been processed. In addition, it was indicated to us in that letter that the construction plans submitted for the development works of Block Number 2 had been referred to the consideration of the ARPE Regional Office at Carolina.

In view of the fact that we are unaware of the progress achieved in the review of the above-mentioned construction plans, we would be grateful to you if you would inform us of the status of the processing of those plans.

K004099

Lionel Motta, P.E.
January 27, 1986
Page two (2)

Thank you for your prompt attention to this matter.

Cordially
BASORA & RODRIGUEZ

[Signature]

Luis M. Rodríguez

Enclosures

cc: Mr. Jack Katz
P.F.Z. Properties, Inc.

K004100

SIGNATURE OMITTED IN PRINTING

CERTIFICATION OF TRANSLATION JUNE 8, 1989

I hereby certify that the foregoing translations are correct translations to the best of my knowledge and belief. Documents covered: 0000010-13, 0000188, 0000191-2, 0002842, K004128-9, 0002840-41, 0002850-51, K004098-100.

SIGNATURE OMITTED IN PRINTING
Alicia Betsy Edwards, Ph.D.
Certified Court Interpreter
Administrative Office of the U.S. Courts

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.,	}	CIVIL NO. 87-01915 (HL)
Plaintiff,		
vs.		
RENE ALBERTO RODRIGUEZ, et al.		
Defendants.		

[Logo]

[To right of logo]

Commonwealth of Puerto Rico
Office of the Governor
Planning Board

Minillas Government Center, North Bldg.
Ave. De Diego, Stop 22
Box 41119, San Juan, P.R. 00940-9985

April 10, 1986

[Time stamp]
[Arrow pointing to middle of number 4]
RECEIVED
Apr. 22, [illeg.]
ARPE
Ofc. Administrator
[By hand]
86-608

Lionel Motta, P.E.
Administrator
Regulations and Permits Administration
Box 41179
Santurce, Puerto Rico

RE: Case No. 71-093-URB.

Dear Mr. Motta:

The Planning Board approved an amended alternate preliminary development on May 14, 1976. The conditions that gave rise to that approval have not varied substantially, except for construction of the regional treatment plant, and the bridge over the Río Grande de Loíza. There has not been presented before us any request to reconsider the original approval.

The foregoing notwithstanding, it is pertinent to point out that the Board has asked the Department of Natural Resources for funds to prepare a Management Plan for the Piñones Special Planning Area where the project in question is situated. As that study may develop, we will keep you informed.

Cordially,

[Signature with two asterisks by hand]

Patria G. Custodio, P.E.
Chairman

[Semi-legible time stamp
where one can make out
part of the word
"RECEIVED," and
"APR."
also "A.R."]

[mark of some sort]

0000014

SIGNATURE OMITTED IN PRINTING

CERTIFICATION OF TRANSLATION JUNE 6, 1989

I hereby certify that the following translations are correct translations to the best of my knowledge and belief. Documents covered: 004074-004081, 0000043, 0000044, 0002880, 0002876, 0002877, 0002082, 0002873, 0002874, 0000235, and 0000014.

SIGNATURE OMITTED IN PRINTING
Alicia Betsy Edwards, Ph.D.
Certified Court Interpreter
Administrative Office of the U.S. Courts

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.,
Plaintiff,

vs.

RENE ALBERTO RODRIGUEZ,
et al.

Defendants.

CIVIL NO. 87-01915 (HL)

August 18, 1986

Luis A. Rivera Cabrera, Esq.
Special Aide to the Governor
Fortaleza
San Juan, Puerto Rico

Reference: Vacia Talega Tourist
Residential Project
Case No. 71-083 Urb.
Torrecilla Baja Wd.
Loíza, Puerto Rico

Dear Mr. Rivera Cabrera:

Through the First Extension to Report Number 69-001-F of October 16, 1970, the Planning Board authorized the Location Consultation (Consultation No. 69-003-V) for a tourist-hotel project, including a first (1st.) stage in a part of the farm (106.0 cuerdas) for the development of two thousand (2,000) hotel rooms and two thousand (2,000) dwelling units. This project is currently pending, due to resolutions issued to that effect by the Planning Board and the Regulations and Permits Administration, particularly that of February 24, 1981 (see attached copy).

At present, this Administration has some construction plans for the project of caption under consideration. However, some concern has arisen with respect to the processing thereof, since the concept of the project was originated sixteen (16) years ago and its endorsement of the project may have been affected by the new regulations and development parameters currently in force.

For the reason mentioned hereinabove, a meeting was coordinated with the government agencies concerned, which meeting was held at my office on February 19, 1986 with the attendance of representatives of the following agencies:

- 1- Aqueducts and Sewers Authority
- 2- Electric Power Authority
- 3- Department of Transportation and Public Works
- 4- Highway Authority
- 5- Planning Board

Continuation... [-2-]
Tourist Hotel Project
Vacia Talega
Case No. 71-083 Urb.

August 27, 1986.

- 6- Environmental Quality Board
- 7- Institute of Puerto Rican Culture

The Department of Natural Resources was not represented.

At said meeting, and as was to be expected, the aforementioned agencies agreed (because they considered the project to be one of great magnitude and impact in all of its aspects) to submit to this Administration an updated document stating their present position with respect to the project.

Subsequently, through a letter of April 3, 1986, a reminder about the agreement described hereinabove was sent

to the agencies concerned, granting them an additional thirty (30) days for the presentation of their respective comments.

On June 6, 1986, a second reminder was sent to the agencies and we have yet to receive the endorsements of the following agencies:

- 1- Planning Board
- 2- Department of Natural Resources
- 3- Electric Power Authority
- 4- Aqueducts and Sewers Authority
- 5- Institute of Culture

It should be noted that the Puerto Rico Planning Board, through a letter of April 10, 1986, states with respect to the aforementioned project that: "The conditions which resulted in the approval of the amended alternate preliminary development of May 14, 1976 (which is pending) have not varied substantially, there not being any request to reconsider the original approval issued before its consideration."

However, through a letter of July 22, 1986, the Planning Board requested from this Administration some additional information related to the plans for the project, which establishes that they are apparently doing a more detailed analysis on the project in order to issue a final position on the matter.

For the purpose of expediting the endorsements pending and in view of the importance of the project, we have decided to hold a new meeting with the heads of said agencies to make a presentation of the project, so that it will facilitate the comments or of-

Continuation...
Tourist Hotel Project
Vacía Talega
Case No. 71-083 Urb.

[-3-]

August 27, 1986

final position of the different agencies and we can proceed to the evaluation of the construction plans under our consideration. This meeting will be held on September 9 at 3:00 p.m. in my office and I feel that your attendance thereat will be very beneficial.

I trust that I have offered you enough details to give you a general overview of the project.

Cordially,

Lionel Motta García
Administrator

CERTIFIED: That this is a correct translation.

Francisco J. Gutiérrez
Certified Court Interpreter
Administrative Office of the United States Courts
SIGNATURES OMITTED IN PRINTING

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.,
Plaintiff,

vs.

RENE ALBERTO RODRIGUEZ,
et al.

Defendants.

CIVIL NO. 87-01915 (HL)

[Logo]

ARPE

[Left margin]

Commonwealth of Puerto Rico, Regulations and Permits
Administration, Minillas Government Center, North Bldg./
Box 41179, Minillas Sta., Santurce, Puerto Rico 00940

[Time stamp]

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RECEIVED

SEP 2 1986

BASORA & RODRIGUEZ

August 27, 1986

Engineers Basora and Rodríguez
Ave. Ponce de León No. 701
Suite 406, Miramar,
Santurce, Puerto Rico 00907

Re: Case 71-083 Urb.
Tourist-Residential Project
Vacía Talega
Loíza, Puerto Rico

Dear Messrs. Basora and Rodríguez:

The Regulations and Permits Administration for some time has under its consideration advanced partial plans for the urbanization works of the project of reference.

The concept for this project was originated and evaluated about sixteen (16) years ago. Considering that considerable time has passed since that time, this Administration coordinated a meeting with the agencies that have involvement with the project.

The meeting was held on February 19, 1986. In the meeting the aspects of the projects having greatest relevance were discussed, using the original endorsements and parameters considered.

For this purpose, it was decided to evaluate the individual situation more thoroughly, and then to coordinate another meeting to consider your [their] current comments and positions.

Tuesday, September 9, 1986 at 3:00 p.m. has been set as the date to hold the meeting indicated above.

I am hereby inviting you to this meeting, with the intention that you as project developers can present the project, using the means that you judge most appropriate, in such a way that those present can clearly understand the magnitude, characteristics, and scope of the project.

continues.....

K004128

continuation....

Page 2

Vacía Talega Project

The meeting will be held in the Office of the Administrator of A.R.P.E, Lionel Motta García. P.E., located on the 9th floor, North Building, Minillas Government Center, Santurce, Puerto Rico.

We are sending a letter of invitation to the company developing the project, for which reason I think that it prudent to recommend to you that the presentation of the project be previously coordinated among yourselves for the purpose of saving time.

Cordially,

[Signature]

Cruz Marcano Robles
Assistant Administrator for
Regional Operations

K004129

SIGNATURE OMITTED IN PRINTING

CERTIFICATION OF TRANSLATION JUNE 8, 1989

I hereby certify that the foregoing translations are correct translations to the best of my knowledge and belief. Documents covered: 0000010-13, 0000188, 0000191-2, 0002842, K004128-9, 0002840-41, 0002850-51, K004098-100.

SIGNATURE OMITTED IN PRINTING
Alicia Betsy Edwards, Ph.D.
Certified Court Interpreter
Administrative Office of the U.S. Courts

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.,
Plaintiff,

vs.

RENE ALBERTO RODRIGUEZ,
et al.

Defendants.

CIVIL NO. 87-01915 (HL)

(Logo)
ARPE

February 26, 1987

Basora & Rodríguez
Thru Eng. Luis M. Rodríguez
701 Ponce de León Ave.
Centro de Seguros Bldg.
Suite 406
Miramar, San Juan, P.R. 00907

Re: "Vacía Talega"
Hotel-Tourist Res. Project
Case Number: 71-093 Urb.
Loíza, Puerto Rico

Dear Eng. Basora: —

Through letter of January 27, 1986, a letter was submitted to this Administration requesting information about the progress made in the review of the construction plans submitted which were under the consideration of our Carolina Regional Office.

When amended Planning Regulation Number 12 (For the Certification of Construction Projects) took effect on

May 8, 1984, said plans were referred by the Carolina Regional Office to be processed in the Regional Operations Area at the Central Office, which offices are located on floor number 9, North Building, Minillas Government Center, Stop 22, Santurce.

As part of the evaluation of said plans, and in harmony with the provisions of the current Planning Regulation Number 12 (amended), this Administration decided that, because a considerable length of time had elapsed since the original location consultation for the project had been approved (October 16, 1970), as part of the processing requested it became necessary to receive updated comments from the government agencies that had a say in the project.

However, it is important to note that additional developments have occurred in 1976 on the part of the Planning Board confirming the approval of the project and in 1978 the P.R. Supreme Court Denied a Writ of Certiorari filed with said Court. Furthermore, on February 24, 1981, the Regulations and Permits Administration authorized the alternate Preliminary Development for the first section of the project, which included one hundred six cuerdas of land.

For such reason, two (2) interagency meetings were held (February 19 and September 9, 1986) at which the representatives of the agencies concerned stated their updated official position toward the project, which positions were subsequently submitted in writing and are enclosed for your information, as follows:

1. Letter Department of Natural Resources — 1/October/86
2. Letter Institute of Puerto Rican Culture — 16/June/86
3. Letter Environmental Quality Board — 7/October/86
4. Letter Planning Board — 17/October/86

5. Department of Transportation and Public Works —
24/June/86 and 18/June/86
6. Tourism Company

With respect to the construction plans submitted, we understand them to be preliminary because they lack basic details about the urbanization works to serve the project.

Said plans DO NOT provide information on grades, water distribution, sanitary, electric works, off-site locations of said works, accesses proposed, etc., as required by Planning Regulation Number 3.

On the basis of what has been set forth hereinabove, and considering that the letters from the aforementioned government agencies require that the project be presented before them again to obtain the pertinent endorsements to be submitted with the construction plans of the urbanization works, we are hereby returning the plans previously indicated.

I am also taking this opportunity to inform you that we are granting you one (1) year from the date of this letter to submit the final construction plans for the urbanization works before this agency, as provided by Planning Regulation Number 12.

The developer is advised that should he NOT present them within the period granted, it shall be taken to mean that he has desisted from the project and this shall be DISMISSED for all legal purposes and effects.

I hope that what has been stated herein clarifies the position of the agency in relation to the project.

Cordially,

Lionel Motta-García
Administrator

CERTIFIED: That this is a correct translation

Francisco J. Gutiérrez
Certified Court Interpreter
Administrative Office of the United States Courts
SIGNATURES OMITTED IN PRINTING

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.,
Plaintiff,

v.

RENE ALBERTO RODRIGUEZ,
et al.

Defendants.

CIVIL NO. 87-1915 (HL)

BASORA & RODRIGUEZ

Engineers — 701 PONCE DE LEON AVE.
Architects — CENTRO DE SEGUROS BLDG.
Planners SUITE 406 — TEL. 725-9030
MIRAMAR, SAN JUAN, P.R. 00907

VICTOR M. BASORA, P.E.
LUIS M. RODRIGUEZ, P.E.

[Time stamp]

RECEIVED

A.R.P.R.

Off. Administrator

Oct. 9 11:15 AM '87

[illeg. initials by hand]

October 8, 1987

René Rodríguez, P.E.
Administrator
Regulations and Permits Administration
Minillas Government Center
Senturce, Puerto Rico

sRe: Vacía Talega Project
Barrio Torrecilla Baja
Loíza, Puerto Rico
Case No. 71-083-Urb.

Dear Mr. Rodríguez:

We refer to our communications of February 22, 1982, and of January 27, 1986, of which we enclose a copy for you.

With the first of those communications we submitted to ARPE construction plans for the development works of Block No. 2 of the first section approved for development by the Planning Board for the Vacía Talega project. With the second, we were giving follow-up to the progress achieved in the process of the review of said plans by "ARPE".

Up to the present, none of the communications mentioned has been answered, and we are completely unaware of the status of the processing of those plans.

Once again by means of this communication we are re-requesting information on this matter.

Cordially,

BASORA & RODRIGUEZ

[Barely legible signature]

Luis M. Rodriguez

Enclosures

cc: P.F.Z. Properties, Inc.

K004098

BASORA & RODRIGUEZ

Engineers — Architects — Planners

SIGNATURE OMITTED IN PRINTING

CERTIFICATION OF TRANSLATION JUNE 6, 1989

I hereby certify that the foregoing translations are correct translations to the best of my knowledge and belief. Documents covered: 0000010-13, 0000188, 0000191-2, 0002842, K004128-9, 0002840-41, 0002850-51, K004098-100.

SIGNATURE OMITTED IN PRINTING

Alicia Betsy Edwards, Ph.D.

Certified Court Interpreter

Administrative Office of the U.S. Courts

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.,	}	CIVIL NO. 87-01915 (HL)
Plaintiff,		
vs.		
RENE ALBERTO RODRIGUEZ,		
et al.		
Defendants.		

The San Juan Star — Friday, November 13, 1987 Local News

**Berrios, 'Melo' urge freeze
on housing project
By Rolf Olsen of The Star Staff**

Sens. Rubén Berríos and Victoria Muñoz Mendoza called on Gov. Hernández Colón Thursday to freeze a proposed 1,100-acre housing project until the House votes on a bill that would create a forest reserve in the mangrove-rich area of Vacía Talega and Piñones.

The governor, asked about the matter later at a press conference at La Fortaleza, said, "I have instructed the agencies that we are going to do something special in Vacía Talega." But he raised his hands to fend off further inquiries.

The bill, coauthored by Muñoz Mendoza, PDP-at large, and Berríos, PIP-at large, was passed by the Senate in May, but Muñoz Mendoza said the House was unable to consider it because of a flood of bills at the end of the legislative session.

The two senators held a press conference in Berríos's office after learning that PFZ Properties is seeking a Planning Board permit to build 450 high-cost houses within the 9,900 acres of the proposed forest reserve.

"This construction project, if it is carried out, would cause irreparable damage to the policy of conservation which the Senate bill proposes for a natural resource that is of priceless value for our people," Berríos and Muñoz Mendoza said in a letter sent Tuesday to the governor.

They also wrote to House Speaker José "Rony" Jarabo, asking him to speed up consideration of the bill in the House. The senators hope the bill will be voted on at a special session that might be called later this month or when the regular session begins in January.

The bill would establish as public policy the conservation of the area for scientific, ecological and passive recreation purposes. It would direct the Planning Board to draft special regulations to carry out the policy.

"I think the governor views this favorably," Muñoz Mendoza said.

The PDP senator said she spoke to Jarabo about 10 days ago. "He said he was very interested in the bill and that the legislative process would be continued soon."

[Photograph of Sens. Victoria Muñoz Mendoza and Ruben Berríos]

Star photo by José

Sens. Victoria Muñoz Mendoza and Rubén Berríos talk about efforts to establish a forest reserve in the Vacía Talega-Piñones area at a news conference Thursday at the Capitol.

In 1974 the Planning Board had approved a hotel and condominium project on the same PFZ lands, but the project was halted by federal officials as dredging and ground-clearing were underway because the developer lacked a permit from the U.S. Army Corps of Engineers. The project was strongly supported by the PDP administration, also headed then by Hernandez Colón.

In May 1976 the Planning Board approved another PFZ hotel project on 110 acres in the same area, but work never began.

The area, much of it made up of the largest mangrove system in Puerto Rico, should be made into a park "for the future generations that don't vote, but for which we have the responsibility of leaving an inheritance," Muñoz Mendoza said.

"There are such important public interests involved, and they can be implemented in such a park at such a low cost, that there is no reason for not approving it," Berríos said. "We think the obstacles are procedural or posed small interests whose opposition is expressed outside of the governmental sphere."

Berríos also referred to the unusual bipartisan stand taken by himself and Muñoz Mendoza. "I know that this not very common, but maybe it reaffirms the importance of the matter and the need that this [approval of the bill] be done as soon as possible to avoid irreparable damage.

Although the Planning Board said at the Senate public hearings that there are enough existing mechanisms protect the area, Muñoz Mendoza said "the reality different." She said other testimony was given about illegal sand extraction and clandestine dumps and violation of Department of Natural Resources regulations. "We haven't been able to protect the area until now.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.

Plaintiff,

vs.

RENE ALBERTO RODRIGUEZ,
et al.

Defendants.

CIVIL NO. 87-01915 (HL)

Local News The San Juan Star—Saturday, November 14, 1987

Piñones-Vacía Talega Policy Restudied

By Laura Candelas

The Associated Press

Gov. Hernández Colón said Friday his administration is re-evaluating public policy on the ecologically sensitive Vacía Talega and Piñones areas and will announce a final decision during his State of the Commonwealth message in January.

Hernández Colón, in an interview, said, "I gave instructions to the pertinent agencies several months ago," including the Planning Board and the Natural Resources Department.

Because of that, "no permit decision can be made until a new public policy can be determined," Hernández Colón said.

"I propose to announce a new policy [on Vacía Talega-Piñones] during the State of the Commonwealth message," he said.

Sens. Rubén Berríos, PIP-at large, and Victoria Muñoz Mendoza, PDP-at large, coauthored a bill that would create a forest reserve in the area, and called on the governor Thursday to halt a proposed housing development in the area until the House has a change to act on the measure.

Asked whether the planned restructuring of public policy for the area meant the Muñoz-Berrios bill would not be enacted, the governor replied: "It means that no project will be approved until public policy is reformulated. In the meantime, everything depends on the study and analysis being carried out."

The two senators said at a news conference Thursday they were sending a letter to the governor asking him to freeze a proposed 1,100-acre housing project until the House votes on a bill to create a forest reserve in the mangrove-rich area of Vacía Talega and Piñones.

Hernández Colón said that one of the areas to be checked is a claim by area residents that the land was ceded them by the Spanish crown before 1898.

The old law will be reviewed, he said, in an attempt to confirm their position. He called the people living in the zone "an important community."

"I have no information on that now, but if this is true, it will be an important area to consider," the governor said.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.,
Plaintiff,

vs.

RENE ALBERTO RODRIGUEZ,
et al.

Defendants.

CIVIL NO. 87-01915 (HL)

BASORA & RODRIGUEZ

Engineers • Architects • 701 PONCE DE LEON AVE.
Planners CENTRO DE SEGUROS BLDG.
SUITE 406 — TEL. 725-9030
MIRAMAR, SAN JUAN,
P. R. 00907

November 20, 1987 ENG. VICTOR M. BASORA
ENG. LUIS M. RODRIGUEZ

Eng. René Rodríguez, Administrator
Regulations and Permits Administration
Minillas Government Center
Santurce, Puerto Rico

Re: Preliminary Plans Structures
Block No. 2
Case No. 78-21-A-698CPD
Case No. 71-083 URB
Vacía Talega Project
Torrecilla Wd., Loíza

Dear Eng. Rodríguez:

Pursuant to what is provided by Topic 3, Section 9.00, "Consultations and Preliminary Plans," of Regulation No. 12, "Regulation for the Certification of Construction Projects," we are enclosing the required number of copies of

each one of the documents that constitute the preliminary plans for the structures to be built in Block No. 2 of the aforementioned project.

We shall appreciate the prompt evaluation and consideration of said preliminary plans.

These preliminary plans were already presented to you this past November 17, 1987, at which time you refused to receive them for their filing. We have presented them anew on this occasion because, irrespective of whether your final decision is to approve or disapprove the aforementioned preliminary plans, that Agency has the obligation of receiving these documents for filing, since they comply with all legal and regulatory requirements therefor.

Cordially,

BASORA & RODRIGUEZ

(sgd.) Illeg.

Luis M. Rodríguez

Enclosures

RR_ARPE.AE

SIGNATURE OMITTED IN PRINTING

TRANSLATOR'S NOTE: These documents are in English, except for the following:

Sent to: Eng. René Rodríguez, Adm.

Street and No. RPA-Minillas Government

Center-North Building-9th. Floor-Santurce, P.R.
--

3. Article Addressed to: Eng. René Rodríguez, Administrator Regulations and Permits Administration Minillas Government Center North Building - 9th. Floor Santurce, Puerto Rico

5. Signature - Addressee X (sgd.) Flor C. Fernández
--

6. Signature - Agent X RPA

CERTIFIED: That this is a correct translation

SIGNATURE OMITTED IN PRINTING

Francisco J. Gutiérrez

Certified Court Interpreter

Administrative Office of the United States Courts

**COMMONWEALTH OF PUERTO RICO
REGULATIONS AND PERMITS ADMINISTRATION
CONSULTATION ON COMPLIANCE WITH THE
ZONING REGULATION**

GENERAL INFORMATION:

FILING (For use by the RPA)	
Number	Date

CADASTRE NUMBER				
Municipality	Map		Block	Parcel
	1:10.000	1:1.000		
043	000	000	008	1

PROJECT

RE	VACIA TALEGA PROJECT (Block No. 2)
Tract Location	Road 187 Torrecilla Baja Wd. Loíza, Puerto Rico

If it has been filed before, state:		
	Filing Number	Date
Location	69-002-U	Oct. 16, 1970
Development	71-083-Urb.	Feb. 24, 1981
XXXXXXXXXXXXXXXXXXXX	78-21-A-698CPD	Feb. 24, 1981

IDENTIFICATION**OWNER**

P.F.Z. PROPERTIES, INC.
P.O. Box 3189
San Juan, Puerto Rico 00904
Telephone 791-1100

PROJECT PLANNER

Note profession

Basora & Rodríguez
701 Ponce de León — Suite 406
Santurce, Puerto Rico
Telephone 725-9030

**NOTE: Please indicate what is proposed (1st. line),
and existing (2nd. line), if applicable.**

ling District(s)	Maximum height		Population Density (sq m/b.h.u.)	Area of the Lot (sq m)	
	Stories	Meters			
Area of Occupation (sq m)	Gross Floor Area (sq m)	Size of the yards (in meters)			
		Front	Left	Right	Back
SEVERAL BUILDINGS					
(SEE PLAN)					

B — Use**STRUCTURE:****TYPE OF PROJECT**

- ☐ New building
☐ Expansion
☐ Alteration
☐ Reconstruction
☐ Amendment
☐ Model Plan
☐ Other _____

(Specify)

RESIDENTIAL (indicate %)

1. ☐ One family
 2. ☒ Two or more families (indicate the no. of units _____)
 3. ☐ Town houses (indicate the no. of units _____)
 4. ☐ Hotel (indicate the number of units _____)
 5. ☐ Others _____

(Specify)

NON-RESIDENTIAL (indicate %)

1. ☐ Industrial, warehouse
 2. ☐ Commercial, office
 3. ☐ Educational
 4. ☐ Institutional
 5. ☒ Recreational facilities
 6. ☒ Parking
 7. ☐ Others _____

(Specify)

In type of structure

- ☐ Reinforced concrete
☐ Reinforced concrete and blocks
☐ Structural steel
☐ Wood and combinations
☐ Others _____

(Specify)

D- Please indicate with "X"

1. Solid waste disposal
 2. Wastewater disposal
 3. Drinking water supply

Public**Private**

1. Solid waste disposal		X
2. Wastewater disposal	X	
3. Drinking water supply	X	

E- indicate if the structure has

1. ☐ Central air unit
2. ☐ Elevator (No. _____)
3. ☐ Incinerators
4. ☐ Cisten
5. ☐ Swimming pool
6. ☐ Parking (indicate no. of spaces)
 _____ inside the building
 _____ outside the building

Please indicate the number of
houses or apartments with:

- One bedroom
- Two bedrooms
- Three bedrooms
- More than three bedrooms

F- Funds for Project (indicate %)

Specify source public funds (See plan)

Public	Private
_____	100
_____	_____

H- Vicinal facilities to be provided (indicate %)

- | | |
|---|--|
| 1. <input type="checkbox"/> School | 7. <input type="checkbox"/> Substation (_____ KW) |
| 2. <input type="checkbox"/> Commercial | 8. <input type="checkbox"/> Septic tank |
| 3. <input type="checkbox"/> Community Center | 9. <input type="checkbox"/> Loading and unloading areas
(No. _____) |
| 4. <input checked="" type="checkbox"/> Active recreation | 10. <input type="checkbox"/> Levels of basements or half-
basements (No. _____) |
| 5. <input checked="" type="checkbox"/> Passive recreation | |
| 6. <input type="checkbox"/> Shelter area | |

VARIATIONS, EXCEPTIONS, DIRECT AUTHORIZATIONS REQUESTED:

See CERTIFIED: That this is a correct translations

Francisco J. Gutiérrez
Certified Court Interpreter
Administrative Office of the United States Courts

REASONS WHY REQUESTED:**STATEMENT OF APPLICANT:**

I declare that this application, including the documents enclosed, has been examined by me and, according to my information and belief, it is true, correct and complete.

SIGNATURE Eng. Luis M. Rodríguez
Lic. No. 2194

K004091

SIGNATURES OMITTED IN PRINTING

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.,

Plaintiff,

vs.

RENE ALBERTO RODRIGUEZ,
et al.

Defendants.

CIVIL NO. 87-01915 (HL)

COMMONWEALTH OF PUERTO RICO

OFFICE OF THE GOVERNOR

LA FORTALEZA

SAN JUAN, PUERTO RICO 00901

(COMMONWEALTH LOGO) December 2, 1987

MEMORANDUM:

TO: The Hon. Héctor Rivera Cruz
Secretary of Justice
: The Hon. Justo A. Méndez
Secretary of Natural Resources
: The Hon. Pedro Ortiz Alvarez
Secretary Consumer Affairs
: The Hon. José A. Nazario
Secretary of Housing
: The Hon. Leonardo González
Secretary of Recreation and Sports
: Eng. Patria Custodio, Chairperson
Planning Board
: Mr. René Rodríguez, Administrator
Regulations and Permits Administration
: Mr. Miguel Domenech, Executive Director
Tourism Company

FROM: Amadeo I.D. Francis (sgd.) Illeg.
 Adviser to the Governor
 SUBJECT: Statements of public policy

Last Tuesday, November 24, we met to discuss a commission from the Chief Executive to elaborate two preliminary public policy statements related to the Vacía Talega area and the subject of recreation and beaches.

Following an intense discussion, the elaboration of the first draft of these statements was assigned to the Chairwoman of the Planning Board and to the Secretary of Recreation and Sports, respectively. They agreed to submit them to the Adviser on Wednesday, December 2.

We agreed that said preliminary statements would be circulated to the other participants, who promised to review them and send their pertinent comments to the Adviser within 24 hours in order to facilitate the revision process.

If need be, the group would meet again to reach some definitive agreements regarding what should be sent to the Governor as the product of the pondered discussion and consensus of the task force.

Enclosed are the drafts that have been elaborated by our colleagues Patria Custodio and Leo González. I will appreciate that, as agreed, you review them, make whatever recommendations, comments, etc. you may deem pertinent and get them to me sometime Thursday if possible or, if not, no later than noon Friday.

A thousand thanks for your collaboration.
 AF/are

Enclosures

cc: Mr. José M. Alonso
 José M. Berrocal, Esq.

CERTIFIED: That this is a correct translation

Francisco J. Gutiérrez
 Certified Court Interpreter
 Administrative Office of the United States Courts

SIGNATURES OMITTED IN PRINTING

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.,	}	CIVIL NO. 87-01915 (HL)
Plaintiff,		
vs.		
RENE ALBERTO RODRIGUEZ,		
et al.		
Defendants.		

The San Juan Star, Thursday, December 3, 1987

**VACIA TALEGA project refused
planning opts for preserving sensitive area
By Rolf Olsen of The STAR Staff**

Plans to build a \$200 million housing development on mangrove-rich lands in Vacía Talega have been turned down by the Planning Board, board member Lina Dueño confirmed Wednesday.

The board's decision was made Nov. 18, only days after Gov. Hernandez Colón said his administration was reevaluating public policy on the environmentally sensitive coastal area east of San Juan.

Hernández Colón said he would announce the new policy for the Vacía Talega and Piñones area in January. He also said "no permit decision can be made until a new public policy can be determined."

Among the board's reasons for rejecting the proposal was the developer's failure to document "the significant environmental impacts" of construction in the area, which lies within the largest mangrove forest in Puerto Rico.

The developer, PFZ Properties, proposed building 450 luxury houses on 1,100 acres. The same company was

Development from Page 1

stopped as it began clearing land for a hotel and condominium project in the same area in 1974 because it lacked a permit from the U.S. Army Corps of Engineers to dredge and fell vegetation in the wetlands.

[Photograph of site and map of area with proposed site]

A housing development planned for the mangrove-rich area of Vacía Talega would have been in the background area at left of this file photo. The map shows the site's relation to the coast.

Despite that federal agency's jurisdiction in the area, the Corps of Engineers reported last month that it had not been consulted by PFZ about the new project.

Hernández Colón made his announcement of a new public policy for the area after Sens. Rubén Berrios, PIP-at large, and Victoria Muñoz Mendoza, PDP-at large, asked him to freeze consideration of the project until the House could vote on a bill that would create a 9,900-acre forest reserve. The bill, coauthored by Berrios and Muñoz Mendoza, has already been approved by the Senate.

The board cited six reasons for rejecting PFZ's proposal, including the environmental concerns. To erect the homes, three million cubic meters of fill would be placed on 515 acres of low-lying land.

"There also might be important archeological sites in the area," the board said.

Also, the board said the proposal is "incompatible" with requirements imposed on the company for another project lying within the same acreage.

In 1976, the government okayed the development of 2,000 hotel rooms and 2,000 housing units on about 106 acres. This was to be the first phase of a larger project involving 8,000 hotel rooms and 8,135 housing units on 266 acres. None of this has been built. Some portions of these first phases fall within the 1,100 acres where the new proposal is planned.

However, the Environmental Quality Board last year said PFZ must file a new environmental impact statement to update the one filed with the 1970s project. An EQB official said Wednesday this new document has not been filed.

The board also said the 450 unit project does not fit the fundamental purpose of the area's R-0 zoning district. "The purpose of this zoning is not the development of low-density housing developments."

In addition, the board said most of the lands lie in a flood-prone zone.

The board notes in its four-page statement that the acreage proposed for development "includes a significant portion of the most extensive mangrove forest in Puerto Rico, inhabited by species of flora and fauna of special importance."

While PFZ has until Dec. 20 to file an appeal, none had been filed as of Wednesday. A call to PFZ executive Jack Katz for his comments was not returned.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.,

Plaintiff,

vs.

RENE ALBERTO RODRIGUEZ,
et al.

Defendants.

CIVIL NO. 87-01915 (HL)

(LOGO) A R P E

December 4, 1987

Mr. Amadeo I. D. Francis
Adviser to the Governor
La Fortaleza
San Juan, Puerto Rico

Subject: Comments on Reports from the Planning Board
and Department of Recreation and Sports about
the Piñones Sector, Recreation and Beaches

Dear Mr. Francis:

We have examined the document from the Department of Recreation and Sports and from the Planning Board and, based on what is provided therein, we establish the following observations:

1. From the document one cannot clearly determine what is the Planning philosophy involved or what are the genuine alternatives that the Planning Board proposes for the sector as public policy.

2. Another of the situations that we are not able to analyze in a definite manner is that the adviser's letter specifically refers to Vacía Talega and the Planning Board is more

extensive and talks about the Piñones Sector. Should that be so, it would mean that a greater area is covered and the costs would vary, considering land acquisition and development.

3. In its analysis, the Board refers to the acquisition of 4,600 cuerdas. We are aware that the sector covers an area of over 9,000 cuerdas. We are concerned about what is to be done with the remainder of the farm. To that we would like to add that one should be specific in limiting the area of influence and establishing accurate quantities or, at the least, to fix some parameter and a geographical delimitation to determine what it is that is being considered.

4. Another aspect is in the sense that at the end of its document, in the area that it mentions as Piñones, the Board includes an analysis chart spe-

Mr. Amadeo I.D. Francis
Adviser to the Governor
Page 2

cifically titled "Analysis of the Piñones Alternatives." However, in the body of the document, specifically at the end of page 4 in the last paragraph, the impression is given that the Board chooses the alternative of special zoning and limited development or, rather, development in harmony with the natural resources.

5. In relation to the comments from the Department of Recreation and Sports and the Recreational Development Company, we feel that they try to establish what is the current public policy regarding the operation of the different beach resorts through these two agencies and that, obviously, the purpose of establishing it is to serve as a guideline for the manner and form in which the operation of these activities should be governed if the sector were to be developed as a beach resort and as a special reserve area that could be used by the public of Puerto Rico.

6. One of the recommendations that we feel becomes mandatory after seeing the document from the Department

of Recreation and Sports is that, in our judgment, all of these areas have some recreational potential and should be under a single agency so that the efforts will not be diluted. In this way the efforts would be combined and there would be a greater efficiency as to the planning, development, preservation and operation of these natural resources.

In sum, we feel that we can not lose sight of the following situations now existing:

- a) To get a better or more clear or concrete idea of the situation, a number of coordination meetings should be held with these task forces in order to more clearly ascertain what is the real position of these agencies, particularly that of the Planning Board, concerning the plans that it may have about the area.
- b) The Regulations and Permits Administration is a regulatory agency which in general terms does not establish public policy but rather implements it, wherefore we do not have the power to legislate or establish any special regulation, since it issues from the Planning Board and from other regulatory agencies in Puerto Rico.
- c) We feel that the Department of Recreation and Sports did not fully comply with its commission since no areas are included other than beach areas. As examples we can mention the development of the Condado Lagoon, Luis Muñoz Marín Park, Camuy Caverns, Ceremonial Parks, Forest Areas and Recreation Areas for the elderly.

Mr. Amadeo I.D. Francis
Adviser to the Governor
Page 3

I hope that the foregoing comments serve the purpose for which they were requested.

Cordially,

(sgd.) René A. Rodríguez
René A. Rodríguez
Administrator

CERTIFIED: That this is a correct translation

Francisco J. Gutiérrez
Certified Court Interpreter
Administrative Office of the United States Courts

SIGNATURES OMITTED IN PRINTING

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.

Plaintiff,

vs.

RENE ALBERTO RODRIGUEZ,

individually, and as

DIRECTOR OF THE

ADMINISTRACION DE

REGLAMENTOS Y PERMISOS

Defendant.

CIVIL NO. 87-01915

Plaintiff Demand Trial
By Jury

COMPLAINT

TO THE HONORABLE COURT:

COMES NOW the plaintiff, through its undersigned attorneys and complaining against the defendant, respectfully states and alleges as follows:

1. Plaintiff, PFZ Properties, Inc. is a corporation duly organized and existing under the laws of the Commonwealth of Puerto Rico with its principal place of doing business in Puerto Rico.

2. Defendant, René Alberto Rodríguez, is the Administrator of the Administración de Reglamentos y Permisos, (Construction Licensing Administration, herein after "ARPE") an Agency of the Government of the Commonwealth of Puerto Rico, and he is being sued herein in his individual capacity.

3. The jurisdiction of this Honorable Court is invoked pursuant to 28 USC §§ 1331 and 1343. The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by the Fourteenth Amendment

to the Constitution of the United States of America and the Civil Rights Act of 1871, 42 USC § 1983, providing redress for the deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States of America.

4. Plaintiff PFZ Properties, Inc., is the owner in fee simple of 1358.65 "cuerdas" located in the Torecilla Ward of the Municipality of Loíza.

5. Plaintiff's property is adjacent to the eastern end of a large mangrove wetland of approximately 3500 "cuerdas" commonly known as the Torrecilla-Piñones-Vacía Talega Mangrove Forest.

6. Since the year 1969 plaintiff has been constantly working in the preparation of all the necessary plans, studies, etc., for the development of a portion of its property which does not include the wetlands or mangrove areas. Said preparations for the development of a portion of its property has required a substantial investment of monies on part of the plaintiff.

7. In June, 1972, the Planning Board officially approved the preliminary plan for the first stage of development and authorized the preparation of final construction plans for the infrastructure.

8. Plaintiff caused these plans to be prepared and as modified were submitted, along with an environmental impact study in 1983.

9. Plaintiff accepted restrictions imposed by the Environmental Quality Board of Puerto Rico and stipulated to them, and modified development plan was adopted by the Planning Board, incorporating those modifications.

10. In August of 1974, subsoil studies were initiated as a prerequisite for construction.

11. In May, 1976, after intervention by other agencies and individuals the Planning Board once again approved the

development project of 266.41 "cuerdas" of land in the two stages, and authorized the development of the first stage consisting of 106 "cuerdas".

12. On January 4, 1978, the 1976 decision of the Planning Board was approved by the Supreme Court of Puerto Rico.

13. In August, 1978, the preliminary project was submitted to ARPE for certification of construction permits. No permits were issued but were not denied, either.

14. In September, 1979, minor changes were prepared and submitted to ARPE, along with a requested time schedule for construction of the first stage of the project, as it had requested.

15. Finally, in February of 1981, ARPE, issued a Resolution approving an alternate preliminary development plan for the First Section of 106 "cuerdas", of 2,000 hotel units and 2,000 dwelling units.

16. In March, 1983, the construction drawings were submitted to ARPE for approval.

17. Since then, more requests for the issuance of permits to commence construction of the project were submitted to ARPE. The defendant, acting under color of law has ignored those requests and has refused to take any action thereon.

18. In February, 1987, another request for permits were sought for the development of town-house units included in the First Section of the project that had been approved since 1981.

19. In November, 1987, the Planning Board rejected a plan for the development of the remaining area of the tract consisting of more than 1,000 "cuerdas", but once again iterated its approval of the First Stage of the project.

20. The defendant as Administrator has steadfastly refused to act on the submissions by plaintiff not only paralyzing the construction of the project but also thwarting any attempt at Administrative review.

21. Under the provisions of the Fifth and Fourteenth amendments to the United States Constitution, the plaintiff is entitled to enjoyment of its property and to not be deprived of its property without due process of law.

22. Defendant's refusal to approve and issue building permits constitutes an illegal taking of plaintiff's property without just compensation.

As a result of the action of the defendant herein, the plaintiff herein has been and will continue to be deprived of property without due process of law under color of State Law in violation of the provisions of the Fifth and Fourteenth Amendments to the United States Constitution.

The inaction of the defendant has deprived the plaintiff of properties and rights guaranteed by the Constitution of the United States of America and amendments thereto, and damaged the plaintiff in the amount of \$100,000,000.00.

As a result of the inaction of the defendant, plaintiff is entitled to the sum of \$5,000,000.00 as punitive damages against the defendant.

WHEREFORE, plaintiff prays for relief herein as follows:

That a money judgment be entered in favor of plaintiff and against the defendant herein in the sum of \$100,000,000.00 for compensatory damages and \$5,000,000.00 for punitive damages, plus interest, costs and attorneys fees.

In San Juan, Puerto Rico, this 24th day of December, 1987.

Respectfully Submitted:

Law Firm of
NACHMAN & FERNANDEZ-SEIN
P.O. BOX 9949
Santurce, Puerto Rico 00908
Tel.: (809) 724-1212

SIGNATURE OMITTED IN PRINTING
A. SANTIAGO-VILLALONGA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.,	}	CIVIL NO. 87-01915 (HL)
Plaintiff,		
vs.		
RENE ALBERTO RODRIGUEZ,		
et al.		
Defendants.		

[Logo]

ARPE

[Left margin] Commonwealth of Puerto Rico, Regulations
and Permits Administration, Minillas Government Center,
North Bldg./Box 41179, Minillas Sta., Santurce, Puerto Rico
00940

January 21, 1988

MEMORANDUM

TO: René A. Rodríguez Rodríguez, P.E.
Administrator

FROM: Cruz Marcano Robles, P.E.
Assistant Administrator for
Regional Operations

SUBJECT: CHRONOLOGY OF EVENTS (BACKGROUND)
"VACIA TALEGA" PROJECT
LOIZA, PUERTO RICO
CASE NO. 71-083 URB
78-21-A-698 CPD

As requested, I include the Chronology of Events for the
Vacía Talega Project in Loíza as requested. Corrections to
that prepared on January 14, 1988, are included.

I also include a summary of communications received
from the agencies that have an influence on the project, also
in chronological order.

Those documents serve as a reference to update the
"status" of the case, and to provide information, should it be
required.

Enclosures:

004074

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.,	}	CIVIL NO. 87-01915 (HL)
Plaintiff,		
vs.		
RENE ALBERTO RODRIGUEZ,		
et al.		
Defendants.		

[Logo]

ARPE

[Left margin] Commonwealth of Puerto Rico, Regulations
and Permits Administration, Minillas Government Center,
North Bldg./Box 41179, Minillas Sta., Santurce, Puerto Rico
00940

January 21, 1988

VACIA TALEGA DEVELOPMENT
CASE NO. 71-083 URB.
78-21-A-698 CPD
BO TORRECILLA, LOIZA

COMMUNICATIONS RECEIVED FROM AGENCIES

(1) April 10, 1986 : Planning Board

Indicates that the conditions that gave rise to approval
of the amended alternate preliminary development on
May 14, 1976, have not varied substantially, no request at all
having been received to reconsider the original approval
issued.

(2) June 10, 1986: Institute of Puerto Rican Culture

Before endorsing the project, requires the following:

(a) Preparation of an integral archaeological study
of the entire area to be affected by the project.

(b) The proponent (the developer) shall present a
conservation and mitigation plan that guarantees
the integrity and study of the archaeological and
historical resources there extant.

(3) June 18, 1986: Department of Transportation and
Public Works (see endorsement in
detail).

The need for studies for the preparation and approval of
environmental documents is established, because the envi-
ronmental impact of the project has substantially changed the
original evaluation.

The Road Plan approved for the San Juan Metropolitan
Region in 1982 recommends a special typical section for the
Paseo de Piñones, different from that which was considered
for the Vacía Talega Project, therefore it is required that the
project be again submitted to the Department for recommen-
dations in that regard.

004075

Communications Received [-2-] January 21, 1988
from Agencies
Vacía Talega Devel.
Case No. 71-083 Urb.
76-21-A-698 CPD

(4) September 9, 1986 : Aqueduct and Sewer Authority
(At an inter-agency meeting)

There are water and sanitary facilities to serve the pro-
ject, taking into account the facilities at the Carolina Regional
Treatment Plant, built and operating in Piñones.

- (5) September 9, 1987 : Electric Energy Authority (At an inter-agency meeting)

Facilities to serve the project would be brought from Ave. 65th de Infanteria (El Viejo Comandante), by off-site works to the project.

- (6) October 1, 1986: Department of Natural Resources

The development of the first stage of the project is endorsed on the 106.0 *cuerdas*, it being ruled that any additional development in the remaining part of the property shall be carefully evaluated, and it is recommended that those lands be reserved for recreational, educational purposes, and as a zone to buffer human activity. For conservation of the mangrove areas in their natural state, it requests their transfer, by means of a deed, to the Department referred to.

- (7) October 7, 1986: Environmental Quality Board

It was requested that there be prepared a Preliminary Environmental Impact Statement, or a Supplement to the Final Environmental Impact Statement, in accord with the Regulation on Environmental Impact Statements, Section 5.5.1.4.

- (8) October 17, 1986: The Planning Board indicates, further, that the public policy aspects such as preservation of the mangrove areas, control of building in flood-prone areas and access to beaches, were originally considered by the Board. Any broadening of the Original Consultation on Location [*Consulta de Ubicación Original*] should be filed with the Planning Board. It finds that the environmental process in the original approval of the consultation on location was completed. (See comments of the Environmental Quality Board in this regard).

004076

[Logo]

ARPE

[Left margin]

Commonwealth of Puerto Rico, Regulations and Permits Administration, Minillas Government Center, North Bldg./ Box 41179, Minillas Sta., Santurce, Puerto Rico 00940

January 21, 1988

CHRONOLOGY OF EVENTS (BACKGROUND)
"VACIA TALEGA" PROJECT
LOIZA, PUERTO RICO
CASE NUMBER 71-083 URB.
78-21-A-698 CPD

- (1) October 16, 1970: The Puerto Rico Planning Board, hereinafter known as the Board, approves Consultation [*Consulta*] 69-002-U on the location of a tourist-hotel-residential complex on a 200-*cuerda* parcel located to the north in the Punta Vacía Talega section in Barrio Torrecillas in Loíza, which forms part of a larger property of approximately 1,385.65 *cuerdas* in size, owned by P.F.Z. Properties Inc.

- (2) June 1, 1972: The Board approves the preliminary development for that project on a tract of land of 192 *cuerdas*, of which 84 *cuerdas* comprise Section I for 8,600 hotel rooms; 90 *cuerdas* comprise Section II for 8,219 multifamily housing units, and the 18 remaining *cuerdas* for vicinal facilities. That authorization was based on the San Juan Metropolitan Area Land Use and Transportation Plan [*Plan de Usos de Terreno y Transportación para el Area Metropolitana*], including the Vacía Talega Sector, adopted by the Board on May 21, 1971.

- (3) June 29, 1973: The proponent submits an alternate development, modifying the street pattern and plot configurations for various uses.

(4) July 13, 1973: The Board informs the proponent that it will not make a final consideration of any project until doing a study of the area, and until a public policy has been adopted on tourist residential uses to be established in Costal Zones.

(5) July 24, 1974: The Board approves the alternate preliminary development, including the recommendations of agencies concerned, a study of the area and established policy, on a land tract with a size of 266.41 *cuerdas* to be developed on the basis of the requirements for an R-5 District, providing 8,600 hotel rooms, and 8,135 residential units on 10 residential parcels.

004077

Summary of Events (Background) [-2-] January 21, 1988
 "Vacía Talega" Project
 Loíza, P.R.
 Case No. 71-083 Urb.
 78-21-A-698 CPD

(6) August 21, 1974: The residents of the sector to be developed, through Attorney Pedro J. Saade, filed with the Board a motion to reconsider the resolution [*acuerdo*] of July 24, 1974.

(7) September, 1974: The proponent, P.F.Z. Properties, filed with the Board a brief opposing the motion for reconsideration.

(8) May 14, 1976: The Board authorizes the amended alternate development that includes the development of a first section of only 106 *cuerdas*, located in the North Sector of the Main Property [*Finca Principal*], temporarily excluding the remaining area of the property, because it is a mangrove area and flood-prone. By the same token, the motion for reconsideration of the July 24, 1974 approval filed by residents of the sector, was denied.

Number of hotel rooms in this first section: 2,000.

Number of housing units in this first section: 2,000.

This resolution [*acuerdo*] authorized preparation of the construction plans for the urbanization works of the first section of the project, valid for (1) year from the date of the notification of July 14, 1976.

(9) July 7, 1976: The Board, through the Third Extension to Report Number 72-Urb.-001-F, denies the motion for reconsideration submitted.

(10) July 14, 1976: Residents of the Sector to be developed, through the firm Legal Services of Puerto Rico Inc., submitted a motion for reconsideration of the Board's resolution [*acuerdo*] of May 14, 1976.

(11) September 26, 1977: The Superior Court of Puerto Rico, San Juan Section [*Tribunal Superior de P.R., Sala de San Juan*], issues a ruling dismissing the suit filed by residents Victorio Pizarro Acosta and others (appellant petitioners) against the Puerto Rico Planning Board (appellee), in relation to the alternate development approved by the Board on May 14, 1976.

(12) January 4, 1978: On a petition for Certiorari by the parties involved, numbered 0-77-419, The Supreme Court of Puerto Rico, in a decision, RULED that the PETITION WAS DENIED.

004078

Summary of Events (Background) [-3-] January 21, 1988
 "Vacía Talega" Project
 Loíza, P.R.
 Case No. 71-083 Urb.
 78-21-A-698 CPD

(13) August 24, 1978: The preliminary development for the project is submitted to the consideration of the Regulations and Permits Administration.

- (14) March 4, 1980: The project application is again circulated among the government agencies, as part of the evaluation of the preliminary development submitted.
- (15) March 20, 1980: The Environmental Quality Board indicates, by means of a letter, that the administrative process of evaluating the Environmental Impact Statement of the project has not concluded, for which reason Law Number 9 of June, 1970, as amended, has not been complied with.
- (16) April 28, 1980: The Planning Board on a request for consultation made by the Regulations and Permits Administration, as to the position of the Environmental Quality Board previously described, finds that the project complied with all the procedural requirements in the environmental impact evaluation.
- (17) February 24, 1981: The Regulations and Permits Administration authorized the alternate preliminary development for the first section of the project (106.00 *cuerdas*), including around 500 hotel rooms, and 3,056 housing units, distributed in 1,952 residential apartments, and 1,104 condo-hotel apartments.
- (18) February 22, 1982: The firm Basora & Rodríguez, submitted to the Technical Review Office [*Area de Revisión Técnica*], preliminary construction plans for a first stage of the project, including, furthermore, the preliminary designs for the buildings to be constructed at that stage.
- (19) March 29, 1982: The Assistant Administrator of the Technical Review Office RETURNS the preliminary designs submitted, because they are not in accord with the alternate preliminary development (February 24, 1981). The construction plans submitted are referred to the Carolina Regional Office.
- (20) January, 1984: The Carolina Regional office remits the construction plans (still pending evaluation) to the

Regional Operations Division [*Area de Operaciones Regionales*] (Central Office) because approval of Planning-Regulation Number 12 (AMENDED) (Regulations for the Certification of Construction Projects) centralizes the processing of these projects.

004079

Summary of Events (Background) [-4-] January 21, 1988
"Vacía Talega" Project

Loíza, P.R.

Case No. 71-083 Urb.

78-21-A-698 CPD

- (21) May 22, 1984: The Assistant Administrator for Regional Operations communicates to the Development firm the adoption of the Planning Regulation No. 12 (For the Certification of Construction Projects), and requests that it indicate if it will or will not avail itself of the certification processes for the plans previously mentioned.
- (22) January 27, 1986: The firm Basora & Rodríguez requests that it be told of the "status" of the review of the construction plans submitted in February of 1982).[sic]
- (23) February 6, 1986: A letter is sent to the chiefs of the agencies with responsibility in the case, the Administrator of ARPE calling them for a meeting on February 19, 1986, to learn of the current position in terms of a project and the plans submitted (see letter sent).
- (24) February 19, 1986: A meeting was held with the agencies present being: the Aqueduct and Sewer Authority; the Electric Energy Authority, the Department of Transportation and Public Works; the Highways Authority, the Planning Board, the Environmental Quality Board, and the Institute of Culture (Department of Natural Resources was not represented). The aforementioned agencies agreed to submit to ARPE updated documents of their current position respectively for the project.

(25) April 3, 1986: The Regulations and Permits Administration sends a letter to the agencies reminding them of the resolution [*acuerdo*] taken at the February 19, 1986 meeting, granting thirty (30) additional days to receive the comments requested (see copy letter attached).

(26) June 6, 1986: Second reminder letter to the government agencies, granting fifteen (15) additional days to receive comments on the project.

(27) August 18, 1986: A letter is sent to Luis A. Rivera Cabrera LL.B. (Special Assistant to the Governor), as to the processing of the case referred to before the agency (see copy).

(28) September 9, 1986: A second meeting is held with all the agency chiefs in the Office of the

004080

Summary of Events (Background) [-5-] January 21, 1988
"Vacía Talega" Project

Loíza, P.R.

Case No. 71-083 Urb.

78-21-A-698 CPD

Administrator, including in this a detailed presentation of the project, by the owners, and the firm Basora & Rodríguez, project engineers.

Again final comments on the project requested from the agencies.

Present were: the Aqueducts and Sewer Authority, the Electric Energy Authority, the Department of Transportation and Public Works, the Highways Authority, the Planning Board, the Environmental Quality Board, the Department of Natural Resources, the Office of Historic Preservation.

(29) February, 1987: A meeting was held of members of the Regulations and Permits Administration, with the Administrator (Lionel Motta, P.E.), broadly discussing the position of the agencies as to the project, concluding among other things the following:

It is not possible to process the project before ARPE with the recommendations of the government agencies submitted.

It was recommended that there be prepared a communication indicating to the proponent the situation in terms of agency endorsements.

(30) November 20, 1987: The firm Basora & Rodríguez submitted to the Technical Review Office some preliminary construction designs for the buildings to be constructed in Block Number 2 of the project. Those preliminary designs were received, and are still (January 21, 1988) pending filing.

(31) December 22, 1987: The firm PFZ Properties filed suit No. 87-01915 HL in Federal Court against the Regulations and Permits Administration for not taking final action in the case, understanding that considerable time has transpired since submission of the documents related to the project. Lawyers for the plaintiffs are: Nachman & Fernández Sein for the amount of \$105,000,000 million.

004081

CERTIFICATION OF TRANSLATION JUNE 6, 1989

I hereby certify that the following translations are correct translations to the best of my knowledge and belief. Documents covered: 004074-004081, 0000043, 0000044, 0002880, 0002876, 0002877, 0002082, 0002873, 0002874, 0000235, and 0000014.

SIGNATURE OMITTED IN PRINTING
Alicia Betsy Edwards, Ph.D.
Certified Court Interpreter
Administrative Office of the U.S. Courts

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.

Plaintiff,

vs.

RENE ALBERTO RODRIGUEZ,
et al.

Defendants.

CIVIL NO. 87-01915 (HL)

ANSWER TO COMPLAINT

TO THE HONORABLE COURT:

Comes now defendant René Alberto Rodríguez through the undersigned attorneys and very respectfully states and prays:

1. Paragraph one (1) is denied for lack of information; at this moment a corporate search is been conducted.
2. Paragraph two (2) is admitted.
3. The allegation contained in paragraph three (3) is a statement of legal conclusion upon which plaintiff choose to state its legal claim. In any case defendant denies said allegation.
4. Paragraph four (4) is denied for lack of information; at this moment a title search is been conducted.
5. Paragraph five (5) is admitted.
6. Paragraph six (6) is denied as stated. In 1969 the Planning Board DENIED plaintiff's proposal for the development of a property comprised of 1200 "cuerdas". The Board rested its decision on several grounds. In first place, a large portion of plaintiff's property was subject to flooding due to

its proximity to the Río Grande de Loíza. Secondly, the Planning Board also found that there is no plan available for financing or for preventing the control of said flooding and that this area lacks the infrastructure necessary for its development, and therefore is considered an isolated area. Lastly, the Planning Board concluded that a large part of this farm is covered by mangroves, ponds and a canal system that should be preserved to protect the ecosystem of the area and the production of nutrients for marine life.

The second sentence of paragraph six (6) is denied for lack of information.

7. Paragraph seven (7) is admitted.

8. Paragraph eight (8) is denied.

9. Paragraph nine (9) is admitted.

10. From paragraph ten (10) it is admitted that subsoil studies were initiated in August of 1974; it is denied that these studies were made as a prerequisite for construction.

11. From paragraph eleven (11) it is denied that on May 14, 1976 the Planning Board approved the development of 266.41 "cuerdas"; it is admitted that the Planning Board approved the use of the aforementioned 266.41 "cuerdas" for the hotel-tourist project and authorized only the development of 106 "cuerdas".

12. Paragraph twelve (12) is admitted.

13. From paragraph thirteen (13) it is only admitted that in August, 1978 the preliminary project was submitted to A.R.P.E.. The rest of the paragraph is denied.

14. Paragraph fourteen (14) is denied. According to A.R.P.E.'s record there is no evidence of this information.

15. It is only admitted from averment fifteen (15) that ARPE issued a Resolution approving an alternate preliminary plan for the First Section of 106 "cuerdas". The rest of the paragraph is denied.

16. Paragraphs sixteen (16), seventeen (17), eighteen (18), twenty (20), twenty one (21) and twenty two (22) are denied.

17. Paragraph nineteen (19) is admitted.

AFFIRMATIVE DEFENSES

1. This case is not ripe for adjudication since the plaintiff has not submitted the necessary final construction plans to effectively evaluate the project and make a final determination.

2. ARPE has been unable to grant the permits necessary for construction due to plaintiff's lack of compliance with ARPE's requirements.

3. In order to evaluate and approve the Project, the endorsement of several governmental agencies is needed. Not all of the agencies involved have endorsed this project. Without these endorsements ARPE cannot evaluate or approve the project.

4. The complaint fails to state a claim against defendant, upon which a relief can be granted under the provisions of the Fifth and Fourteenth amendments to the United States Constitution of the United States or under the applicable laws of the Commonwealth of Puerto Rico.

5. Defendant acted at all times according to law and in good faith, therefore, he is entitled to the protection afforded by qualified immunity.

6. In the hypothesis that plaintiff is entitled to any relief, which defendant denies, plaintiff is not entitled to recover punitive damages.

7. Any claims for damages and equitable relief against defendant, for acts and conduct in his official capacity are barred by the Eleventh Amendment.

WHEREFORE, defendant prays to this Honorable Court that the Complaint be dismissed and that plaintiff be charged with costs and attorney's fees.

I HEREBY CERTIFY that on this same date a true copy of this document has been sent by mail to: A. SAINTIAGO-VILLANOVA, ESQ., Nachman and Fernández Sein, P.O. box 9949, Santurce, Puerto Rico 00908.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 30 day of March, 1988.

HECTOR RIVERA CRUZ
Secretary of Justice

PEDRO A. DEL VALLE FERRER
Director
Federal Litigation Division

LUIS N. BLANCO MATOS

EMILY RIVAS
Attorney
Federal Litigation Division
Department of Justice
P.O. Box 192
San Juan, Puerto Rico 00902
Tel. 721-2900 — Ext. 552

AC-ER(17)

SIGNATURES OMITTED IN PRINTING

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.

Plaintiff,

vs.

RENE ALBERTO RODRIGUEZ,
et al.

Defendants.

CIVIL NO. 87-01915 (HL)

[Logo]

ARPE

[Left margin]

Commonwealth of Puerto Rico, Regulations and Permits Administration, Minillas Government Center, North Bldg./Box 41179, Minillas Sta., Santurce, Puerto Rico 00940

August 2, 1988

Luis M. Rodríguez, P.E.
c/o Basora & Rodríguez
Ave. Ponce de León No. 701
Centro de Seguros, Suite
Miramar, San Juan, P.R. 00907

Ref: 71-083-Urb.
78-21-A-697-CPP
Tourist-Residential
Vacía Talega Project
Loíza, Puerto Rico

Dear Mr. Rodríguez:

Through a letter of January 27, 1986, there was submitted to this Administration a letter from your office requesting information as to the "progress achieved in the review of the

construction plans for the project in reference, which were under the consideration of the Carolina Regional Office."

Those plans, with the entry into force of the amendments adopted to Planning Regulation No. 12 (Regulation for the Certification of Construction Projects) on May 8, 1984, which include development of lands, were referred by the Regional Office at Carolina to the Regional Operations Office [*Area de Operaciones Regionales*] at the beginning of the 1984 year, to continue their processing.

After evaluating them, the Administration has determined that the plans submitted by your office on February 22, 1982, entitled "Preliminary Project Plans," [Expression in quotes in English in original] are not considered Advanced Plans, Plans for Earth Movement, nor Plans for Construction for Urbanization Works, because they comply neither with the provisions of Res. -P-139 of the Planning Board dated July 31, 1964, nor with Article 67 of the Regulation on *Lotificacion* [might mean?: partition of lots; subdivisions; lot and block description] (Planning Regulation No. 3) of March 17, 1984 as amended.

[Hand note is an unclear number]

Because of the foregoing, returned is a copy of that document that is still kept in our files. The remaining copies were returned to you through a communication sent to your office on March 24, 1982, itself signed by Jorge L. Colón Miranda, P.E., Acting Assistant Administrator, Technical Review Office of the Administration.

Received by: [Signature]

Hour and Date: 10:[??] /8/3/88

Cordially,

[Signature]

Cruz Marcano Robles
Assistant Administrator
for Regional Operations

[By hand]

10

0000161

I hereby certify that this translation is a correct translation to the best of my knowledge and belief.

Alicia Betsy Edwards, Ph.D.
Court Interpreter, Certified by the
Administrative Office of the U.S. Courts

SIGNATURES OMITTED IN PRINTING

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.

Plaintiff,

vs.

RENE ALBERTO RODRIGUEZ,
et al.

Defendants.

CIVIL NO. 87-01915 (HL)

[Logo]

ARPE

[Left margin]

Commonwealth of Puerto Rico, Regulations and Permits Ad-
ministration, Minillas Government Center, North Bldg./Box
41179, Minillas Sta., Santurce, Puerto Rico 00940

[Hand note]

No

Ext?

August 2, 1988

Basora & Rodríguez
c/o Luis M. Rodríguez, P.E.
Ave. Ponce de León 701
Centro de Seguros BLDG Suite 406
Miramar, San Juan, Puerto Rico 00907

Ref: "Vacía Talega" Project
Hotel-Tourist Res.
Case No. 78-21-A-698-CPD
Preliminary design for Buildings, Block #2
Case Number: 71-093-URB.

Dear Mr. Rodríguez:

This Administration received your communication of November 20, 1987, in regards to the preliminary design for the Development and Construction of various buildings corresponding to block number two (2) of the Project of reference.

After analysis and evaluation of the documents included in the file of the case mentioned earlier, it has been determined that it ceased to have legal validity on February 24, 1982, because of lack of compliance with the requirements established in the Resolution that approves the Preliminary Development dated February 24, 1981.

To those purposes, I inform you that it is not procedurally correct to file the preliminary design submitted, because this is part of the original development that, as we have pointed out, has lost its legal validity.

For the consideration of this project in the future, the proper procedure would be to file a new consultation on location before the Planning Board.

Enclosed I return to you the documents submitted.

Cordially, -

[Illegible signature]

Virgilio Gautier, P.E.
Assistant Administrator,
Technical Review Program

VG/CIC/gcr

cc: René A. Rodríguez, P.E.
Administrator, ARPE

[By hand]

107

enclosures

0000159

I hereby certify that this translation is a correct translation to
the best of my knowledge and belief.

Alicia Betsy Edwards, Ph.D.
Court Interpreter, Certified by the
Administrative Office of the U.S. Courts

SIGNATURES OMITTED IN PRINTING

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.

Plaintiff,

vs.

RENE ALBERTO RODRIGUEZ,
et al.

Defendants.

CIVIL NO. 87-01915 (HL)

BASORA & RODRIGUEZ

ENGINEERS — 701 PONCE DE LEON AVE.
ARCHITECTS — CENTRO DE SEGUROS BLDG.
PLANNERS SUITE 406 — TEL. 725-9030
MIRAMAR, SAN JUAN, P.R.
00907

ENG. VICTOR M. BASORA
ENG. LUIS M. RODRIGUEZ

August 17, 1988

Engineer Cruz Marcano Robles
Assistant Administrator
ARPE
Box 41179
Minillas Station
Santurce, Puerto Rico 00940

Dear Engineer Marcano Robles:

Re: 71-083-Urb.
78-21-A-697-CPP
Residencial-Turístico
Proyecto Vacía Talega
Loíza, Puerto Rico
PFZ Properties, Inc.

We are in receipt of your August 2, 1988 letter related to the above captioned project, copy of which is attached for your easy reference.

From your letter, which appears to be a belated response to ours of January 27, 1986, we gather that the construction drawings blueprints submitted by us to your office on February 22, 1982 for the subdivision works of the first section of Project 71-083-Urb, were referred to the Carolina Regional Office. At that same time we submitted a second set of plans entitled "Preliminary Project Plans". It also appears from the same August 2 letter that the construction drawings blueprints for the subdivision works after the regulations for the certification of urbanization projects became effective, were returned to your office for the evaluation and approval process under the regulations in force prior to the certification regulations. Lastly, your letter of August 2 advises us that the Preliminary Project Plans submitted on February 22, 1982, are not advance plans, plans for earth movement works nor construction plans for urbanization works. With the said letter you return to us the single copy of the "Preliminary Project Plans" remaining in your possession.

[-2-]

Your letter of August 2, 1988 is confusing; incorrectly treats our "Preliminary Project Plans" as if they were our construction drawings blueprints for the subdivision works of the first section of the above captioned project; and is in complete contradiction with yours of August 27, 1986 to us, which in fact answered ours of January 27, 1986.

Exactly two years ago, you advised us in writing that on February 19, 1986 (apparently as a result of ours of January 27, 1986) this project was discussed by ARPE and the governmental agencies that have jurisdiction over it. As a result of the February 19, 1986 meeting, you invited us, by letter dated August 27, 1986, to a meeting to be held on

September 9, 1986 for the purpose of giving us the opportunity to explain to all agencies concerned the magnitude, characteristics and scope of the project. We attended that meeting in good faith. The meeting was a very fruitful and positive meeting and at that time we explained and discussed the project in detail with various high level officials of the agencies concerned. Among others, the following officials participated in the meeting: Engineer René Alberto Rodríguez, now Administrator of ARPE; Mrs. Ruth D. Carreras, then Chief, Permits Office, Department of Natural Resources; Engineers Lionel Motta and yourself from ARPE; The Honorable Justo Méndez, Secretary of Natural Resources; Mr. Carlos Alvarado; Chief Executive Officer of the Electric Power Authority; Mr. Miguel Domenech, President, Tourism Development Company; Engineer Arturo Valdejullí, then Chief Executive Officer of the Aqueduct and Sewage Authority and his chief engineer, Mr. Bolívar Guzmán; Mrs. Lina Dueño, Member, Planning Board; Engineer Hernández-Landrau, Executive Director, Highways Authority; and Engineer Carlos Jiménez Barber, Vice-President, Environmental Quality Board.

A question and answer period followed our presentation. None of the various high and top level officials present at the meeting ever directly or indirectly questioned the validity and effectiveness of the relevant Planning Board and ARPE approvals issued to this project. The sufficiency, adequateness and timely filing of our construction drawings blueprints for the subdivision works of the first section of the project also went unquestioned and were taken for granted by all concerned.

Two years after that meeting, we receive your letter of August 2, 1988, rejecting our plans without us, as professionals, even receiving the usual courtesy of comments and requests for clarifications. Moreover, the plans returned to us and referred to in your August 2 letter as the "Preliminary Project Plans", are not the construction drawings blueprints for the subdivision works of the first section of the project,

but other preliminary construction plans for structures that, in order to expedite the process, we filed with ARPE together with the construction

[-3-]

drawings blueprints for the subdivision works and our letter of February 22, 1982.

Lastly, and during the course of the last two years and even as recently as a few weeks ago, we have obtained for the project important endorsements, and renewals of endorsements, from important concerned agencies, such as the Puerto Rico Water Resources Authority and the Electric Power Authority.

The only explanation that we have at this time for what we consider an unwarranted and illegal action on the part of ARPE in connection with the project is the filing by our client of Civil Case 87-01915 before the United States District Court for the District of Puerto Rico.

To confuse the matter further, on August 2, 1988 we received another letter; this from ARPE's Program of Technical Revision, signed by Engineer Virgilio Gautier, where other copies of the same "Preliminary Project Plans" for the structures on Block Two of the project were returned to us, again without comments, and where we are advised that the original Planning Board resolution approving this project and the ARPE resolution of February 24, 1981 approving the preliminary development are, retroactively to February 24, 1982, without effect because of an alleged failure on our part to comply with the requirements of ARPE's Resolution of February 24, 1981. Enclosed is our response to Engineer Gautier.

Please take notice that it is our contention that the original Planning Board Resolution issued on May 14, 1976 is, as of this date, in full force and effect; that the ARPE Resolution issued on February 24, 1981 approving the preliminary alternate development for the first section of the project is, as of

this date, in full force and effect; that on February 22, 1982 (two days before the February 24 deadline) we filed on a timely manner with ARPE the required construction drawings blueprints for the subdivision works of the first section of the project; that said drawings blueprints fully comply with the requisites contained in the ARPE Resolution dated February 24, 1981; that said drawings blueprints have not been rejected; that we have never received from ARPE the customary comments and requests for clarifications concerning said drawings blueprints; and that those drawings blueprints are still duly filed and awaiting appropriate action on the part of ARPE consistent with the law, the regulations in force, the established customary practices and procedures, the August 27, 1986 letter from you, the September 9, 1986 meeting resulting therefrom and the subsequent endorsements by us obtained and kept in effect through renewals.

Everything considered, it is the inescapable conclusion that

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our client, PFZ Properties, Inc., has its project pending with ARPE and that all of the required Planning Board and ARPE approvals involving same are in full force and effect. Moreover, we filed with ARPE, on time and as required, construction drawings blueprints for the subdivision works of the first section of the project. The drawings blueprints were filed more than six years ago and ARPE has failed, and now illegally refuses, to act upon said drawings blueprints as required by the regulations, the law and the established customary practices and procedures.

For the above stated reasons, you are respectfully requested to reconsider the statements contained in the letter of August 2, 1988, and, on reconsideration, confirm that the construction drawings blueprints for the subdivision works of the first section of the project are being evaluated and

processed as required by the law, the regulations, and the established customary practices and procedures.

This request for reconsideration is made without prejudice and our client, PFZ Properties, Inc., reserves its right to pursue all of appropriate remedies for the violation of its rights protected by law through lawsuits in the courts, including the now pending action before the United States District Court.

Awaiting with interest your prompt attention to this very important matter, we remain

Cordially yours,

BASORA & RODRIGUEZ

LUIS M. RODRIGUEZ

SIGNATURE OMITTED IN PRINTING

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.

Plaintiff,

vs.

RENE ALBERTO RODRIGUEZ,
et al.

Defendants.

CIVIL NO. 87-01915 (HL)

BASORA & RODRI UEZ

ENGINEERS — 701 PONCE DE LEON AVE.
ARCHITECTS — CENTRO DE SEGUROS BLDG.
PLANNERS SUITE 406 — TEL. 725-9030
MIRAMAR, SAN JUAN, P.R.
00907

August 17, 1988

ENG. VICTOR M. BASORA
ENG. LUIS M. RODRIGUEZ

Engineer Virgilio Gautier
Assistant Administrator
Technical Revision Program
Administration of Regulations
and Permits (ARPE)
North Building
Centro Gubernamental Minillas
Santurce, Puerto Rico 00907

RE: Proyecto "Vacía Talega", Res.
Hotelero-Turistico, Caso Núm.
78-21-A-698-CPD-Anteproyecto
para Edificaciones, Bloque #2,
Caso Número: 71-093-URB.

Dear Engineer Gautier:

We are in receipt of your letter of August 2, 1988. On that same date we also received a letter from Engineer Cruz Marcano Robles, Assistant Administrator of the Area of Regional Operations. Enclosed is copy of our letter answering Engineer Marcano Robles. The contents of our letter to Engineer Marcano Robles are incorporated as a part of this letter.

Both you and Engineer Marcano Robles returned to our firm Preliminary Project-Plans related to the structures proposed for Block No. 2 of the First Section of the above captioned project. As we have explained in our letter to Engineer Marcano Robles and now again to you, the Preliminary Project Plans are completely different from the Construction Blueprints for the Subdivision Works pertaining to the above captioned project. Said Drawings Blueprints were submitted by our firm to ARPE on a timely manner and in full compliance with the requirements of the Planning Board's approval received by this project and the ARPE's resolution issued on February 24, 1981.

The Drawings Blueprints are still filed and we are still awaiting for ARPE's comments and requests for clarifications in connection with said Drawings Blueprints which are yet to be processed by ARPE according to the law, the regulations and the established customary practices and procedures.

Engineer Virgilio Gautier
Assistant Administrator
Technical Revision Program
Administration of Regulations
and Permits (ARPE)

August 17, 1988

Page No. 2

It is our firm conviction, and the position of our client, that both PFZ, Inc. and our firm have fully complied with all requirements and that, therefore, the Planning Board's approval concerning this project and the ARPE's Resolution approving the Preliminary Development dated February 24,

1981 are in full force and effect. Therefore, this project is very much alive and we hereby request from you the reconsideration of the statements to the contrary contained in yours of August 2, 1988.

This request for reconsideration is made without prejudice and our client, PFZ Properties, Inc., reserves it right to pursue all appropriate remedies for the violation of its rights protected by law through lawsuits in the courts, including the now pending action before the United States District Court.

Awaiting with interest your prompt advices on this very important matter, we remain..

Cordially yours,

BASORA & RODRIGUEZ

LUIS M. RODRIGUEZ

SIGNATURE OMITTED IN PRINTING

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.	}	CIVIL NO. 87-01915 (HL)
Plaintiff,		
vs.		
RENE ALBERTO RODRIGUEZ, et al.		
Defendants.		

BASORA & RODRIGUEZ

ENGINEERS —	701 PONCE DE LEON AVE.
ARCHITECTS —	CENTRO DE SEGUROS BLDG.
PLANNERS	SUITE 406 — TEL. 725-9030
	MIRAMAR, SAN JUAN, P.R.
	00907
	ENG. VICTOR M. BASORA
	ENG. LUIS M. RODRIGUEZ

August 30, 1988

RETURNED RECEIPT REQUESTED

Engineer Cruz Marcano Robles
Assistant Administrator
Administration of Regulations
and Permits (ARPE)
P.O. Box Number 41179
Minillas Station
Santurce, Puerto Rico 00940

RE: 71-083-URB.-78-21-A-697 CPP
Residencial-Turístico
Proyecto Vacía Talega,
Loíza, Puerto Rico
PFZ Properties, Inc.

Dear Engineer Marcano Robles:

Further to our letter to you of August 17, 1988 requesting reconsideration of your determination related to the above captioned project, we bring to your attention the statements made to the Senate and the House of Representative of the Commonwealth of Puerto Rico by ARPE and the Planning Board dated, respectively, October 21, 1986 and March 7, 1986, copy of both statements enclosed. In both presentations the first related to P del S No. 320 of March 13, 1986 and the second related to P de la C No. 638, it is stated in no uncertain terms that the above captioned project is an approved project.

Therefore, it appears from the formal presentations made to our Legislature by both ARPE and the Planning Board that as of October 21, 1986 and March 7, 1986 the above captioned project was an approved project. This is completely consistent with our position and makes untenable the position of ARPE in the letter to us of August 2, 1988 to the effect that the approval lost its

Engineer Cruz Marcano Robles

August 30, 1988

Page -2-

effectiveness on February 24, 1982.

Cordially yours,

BASORA & RODRIGUEZ

Luis M. Rodríguez

cc: Engineer Virgilio Gautier

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SIGNATURE OMITTED IN PRINTING

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.

Plaintiff,

vs.

RENE ALBERTO RODRIGUEZ,
et al.

Defendants.

CIVIL NO. 87-01915 (HL)

BASORA & RODRIGUEZ

ENGINEERS — 701 PONCE DE LEON AVE.
ARCHITECTS — CENTRO DE SEGUROS BLDG.
PLANNERS SUITE 406 — TEL. 725-9030
MIRAMAR,
SAN JUAN, P.R. 00907
ENG. VICTOR M. BASORA
ENG. LUIS M. RODRIGUEZ

August 30, 1988

RETURNED RECEIPT REQUESTED

Engineer Virgilio Gautier
Assistant Administrator
Technical Revision Program
Administration of Regulations
and Permits (ARPE)
North Building
Centro Gubernamental Minillas
Santurce, Puerto Rico 00907

RE: Proyecto "Vacía Talega", Res.
Hotelero-Turístico, Caso Núm.
78-21-A-698-CPD-Anteproyecto
para Edificaciones, Bloque #2,
Caso Número: 71-093-URB.

Dear Engineer Gautier:

Further to our letter to you of August 17, 1988 requesting reconsideration of your determination related to the above captioned project, we bring to your attention the statements made to the Senate and the House of Representative of the Commonwealth of Puerto Rico by ARPE and the Planning Board dated, respectively, October 21, 1986 and March 7, 1986, copy of both statements enclosed. In both presentations the first related to P del S No. 320 of March 13, 1986 and the second related to P de la C No. 638, it is stated in no uncertain terms that the above captioned project is an approved project.

Therefore, it appears from the formal presentations made to our Legislature by both ARPE and the Planning Board that as of October 21, 1986 and March 7, 1986 the above captioned project was an approved project. This is completely consistent with our position and makes untenable the position of ARPE in the letter to us of August 2, 1988 to the effect that the approval lost its

Engineer Virgilio Gautier
August 30, 1988
Page -2-

effectiveness on February 24, 1982.

Cordially yours,
BASORA & RODRIGUEZ

Luis M. Rodríguez

cc: Engineer Cruz Marcano Robles

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SIGNATURE OMITTED IN PRINTING

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.,

Plaintiff,

vs.

RENE ALBERTO RODRIGUEZ,
individually, and officially
as Administrator of the
ADMINISTRACION DE
REGLAMENTOS Y PERMISOS,
and the ADMINISTRACION DE
REGLAMENTOS Y PERMISOS,
Defendants.

CIVIL NO. 87-01915 (HL)

PLAINTIFF DEMANDS
TRIAL BY JURY

AMENDED COMPLAINT

TO THE HONORABLE COURT:

COMES now the plaintiff, **PFZ PROPERTIES, INC.**, through its undersigned attorneys and complaining against defendants, respectfully alleges as follows:

1. This is an action for injunctive and declaratory relief, compensatory and punitive damages, and costs and attorney's fees pursuant to the Civil Rights Act of 1871, 42 U.S.C. §§ 1983 and 1988, for violations of plaintiff's rights to substantive due process, procedural due process and equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

2. Plaintiff, **PFZ PROPERTIES, INC.** ("PFZ") (formerly Puerto Rico Properties, Inc.) is a corporation duly organized and existing under the laws of the Commonwealth of Puerto Rico, with its principal place of business at Carolina, Puerto Rico.

3. Defendant René Alberto Rodríguez is the Administrator of the **Administración de Reglamentos y Permisos** (Regulations and Permits Administration) of the Commonwealth of Puerto Rico ("**ARPE**"). He is being sued in his individual and official capacities.

4. Defendant **ARPE** is an agency of the government of the Commonwealth of Puerto Rico, organized pursuant to Law No. 76 of June 24, 1975, as amended, 23 LPRA 71-72i, that issues permits for construction projects.

5. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

6. Venue is based on 28 U.S.C. § 1391(b). René Rodríguez, as an individual and in his capacity as Administrator of **ARPE**, resides within this judicial district. Plaintiff's claims presented herein arose within this judicial district.

7. Plaintiff is the owner of a parcel of land ("the Parcel of Land") of 1,358.65 "cuerdas", located in the Torrecilla Ward of the Municipality of Loíza in an area also known as Vacía Talega and Piñones.

8. According to the Registry of Property, the Parcel of Land is recorded in "pleno dominio" (fee simple absolute) in favor of Plaintiff.

9. The Planning Board of the Commonwealth of Puerto Rico, in Case No. 71-083 Urb., Second Extension to Report No. 72-Urb-001F, dated May 14, 1976, approved an Alternate Preliminary Development Plan for portions of the Parcel of Land. The approved Project ("Project"), which is the subject of this lawsuit, is composed of two Sections as follows:

A First Section, to be developed in a tract of land of approximately 106 "cuerdas" part of the Parcel of Land, consisting of 2,000 hotel rooms and 2,000 residential units (hereinafter referred to as the "First Section of the Project").

A Second Section, to be developed in the balance of 266.41 "cuerdas", that is, on a tract of land approximately 160.41 "cuerdas" part of the Parcel of Land, consisting of 6,600 hotel rooms and 6,135 residential units (hereinafter referred to as the "Second Section of the Project").

The resolution issued by the Planning Board of the Commonwealth of Puerto Rico is hereinafter referred to as "the 1976 Planning Board Resolution."

10. On June 14, 1976, residents of Barrio Torrecilla Baja, Loíza, Puerto Rico ("the Torrecilla residents") filed a petition in the Superior Court of Puerto Rico San Juan Section requesting reconsideration of the 1976 Planning Board Resolution based on its alleged failure to consider adequately the development's impacts on the environment and on the families who live in the area. On September 16, 1977, the Superior Court upheld the 1976 Planning Board Resolution. The Torrecilla residents appealed this decision to the Supreme Court of Puerto Rico, which, by Order dated January 4, 1978, declined to exercise its appellate jurisdiction.

11. By letter of August 19, 1977, the Planning Board granted **PFZ** an extension of time to submit to **ARPE** plans for the Internal Preliminary Development of Blocks for the First Section of the Project until one year after the Superior Court decision became final, if that decision was favorable to the Planning Board.

12. On August 24, 1978, as required by the 1976 Planning Board Resolution, **PFZ** timely submitted plans for the Internal Preliminary Development of Blocks for the First Section of the Project to **ARPE**.

13. On February 24, 1981, **ARPE** by resolution issued in Case No. 78-21-A-698 CPD approved the plans for the Internal Preliminary Development of Blocks for the First Section of the Project, hereinafter referred to as the 1981 **ARPE** Resolution.

14. The First Section of the Project had been reduced by **PFZ** to 79.93 "cuerdas" from the original 106 "cuerdas" by maintaining the contour of the existing road to the site.

15. According to the 1981 **ARPE** Resolution, the First Section of the Project is to be developed on 79.93 "cuerdas" (corresponding to the 106 "cuerdas" contemplated by the 1976 Planning Board Resolution) and consists of approximately 500 hotel rooms, 1,952 residential apartment units and 1,104 condo-hotel apartment units.

16. On February 22, 1982, as required by the 1976 Planning Board Resolution and the 1981 **ARPE** Resolution, **PFZ** timely submitted to **ARPE** Construction Drawings for Site Improvements for the subdivision works of Block 2 of the First Section (hereinafter the "Construction Drawings for Site Improvements"), accompanied by a letter from Basora & Rodríguez (the firm of engineers, architects and planners engaged by **PFZ** to be in charge of the development of Vacía Talega and hereinafter referred to as "the **PFZ** Engineers").

17. On February 22, 1982, **PFZ** also filed with **ARPE** Preliminary Project Plans for the structures to be constructed in Block 2 of the First Section (hereinafter "the Preliminary Project Plans"). Submission of these plans was not required; however, **PFZ** submitted them for **ARPE**'s comments in the interest of facilitating the processing of the Project.

18. On March 24, 1982, **ARPE** returned the Preliminary Project Plans to **PFZ** with a letter stating that consideration of those plans was premature and not in compliance with the 1981 **ARPE** Resolution, which established that the Construction Drawings for Site Improvements be processed first. In the same letter, **ARPE** explained that it had sent the Construction Drawings for Site Improvements to its Regional Office in Carolina, Puerto Rico.

19. On January 27, 1986, the **PFZ** Engineers wrote **ARPE** to inquire about the Construction Drawings for Site Improvements. The letter was never answered.

20. On February 19, 1986 **ARPE** and other Commonwealth agencies held a meeting to discuss the Project.

21. By letter dated August 27, 1986 **ARPE** invited **PFZ** to attend a meeting on September 9, 1986 to give a presentation on the Project to interested Commonwealth agencies.

22. On September 9, 1986, **PFZ** and its Engineers attended the meeting, which was held at the central office of **ARPE**. The meeting was also attended by, among others: defendant René Alberto Rodríguez, then Assistant Administrator of **ARPE** and now Administrator of **ARPE**; Lionel Motta, then Administrator of **ARPE**; Cruz Marcano Robles, now Assistant Administrator of **ARPE**; the Honorable Justo Méndez, Secretary of the Department of Natural Resources; Ruth D. Carreras, Chief Permit Officer of the Department of Natural Resources; Bolívar Guzmán, Chief Engineer of the P.R. Water and Sewer Authority; Arturo Valdejuli, then Executive Director of the P.R. Water and Sewer Authority; Germán Landrau, Executive Director of the Highway Authority; Luis Castro, Chief Engineer of the Highway Authority; Miguel Domenech, Executive Director of the Tourism Development Company; Lina Dueña, Vice-President of the Planning Board; C.J. Barber, Member of the Environmental Quality Board; and, Carlos Alvarado, Executive Director of P.R. Electric Energy Authority. Some of the officials attending were accompanied by members of their respective staffs.

23. Administrator Motta chaired the September 1986 meeting, which lasted for approximately three hours. During the course of the meeting no one directly or indirectly questioned the validity and effectiveness of the 1976 Planning Board Resolution or the 1981 **ARPE** Resolution.

24. Similarly, neither the sufficiency nor the timeliness of the filing of the Construction Drawings for Site Improvements by **PFZ**, as required by the 1976 Planning Board Resolution and the 1981 **ARPE** Resolution, were questioned during the meeting.

25. On October 21, 1986, Lionel Motta, **ARPE** Administrator, reported to the Hon. Jorge Orama Monroig, President of the Agricultural and Natural Resources Committee of the Senate of Puerto Rico, in reference to P. of S. 320 of March 13, 1986, a bill that would incorporate the Vacía Talega Piñones area into the Commonwealth forest system. In the course of his report, Motta referred to the Project as an "approved project". Defendant René A. Rodríguez also referred to the project as "approved" in his report to the Senate Committee on the same bill.

26. On October 8, 1987, the **PFZ** Engineers wrote to defendant René Rodríguez requesting information regarding the progress of the processing of the Project. The letter was never answered.

27. On November 27, 1987, the **PFZ** Engineers resubmitted the Preliminary Project Plans to **ARPE**.

28. On December 9, 1987, Jack Katz, a **PFZ** officer, attended a meeting at La Fortaleza with Mr. Amadeo Francis, Special Advisor to the Honorable Governor of the Commonwealth of Puerto Rico, to discuss the Project.

29. On December 28, 1987, **PFZ** filed its original Complaint in the above-captioned case.

30. On March 30, 1988, defendant Rodríguez answered the Complaint, and on June 6, 1988, filed a Motion to Dismiss.

31. On August 2, 1988, **ARPE** sent two letters to the **PFZ** Engineers one signed by Cruz Marcano Robles, Assistant Administrator of **ARPE**'s Area of Regional Operations, and the second signed by Virgilio Gautier, Assistant Administrator in charge of **ARPE**'s Program of Technical Revisions. In these two letters **ARPE**, among other things, stated that the 1976 Planning Board Resolution and the 1981 **ARPE** Resolution were no longer in effect.

32. The letter signed by Mr. Marcano Robles was sent to the **PFZ** Engineers by messenger with a transmittal note from defendant René A. Rodríguez.

33. The letter signed by Mr. Gautier was sent to the **PFZ** Engineers by messenger with a transmittal note from Attorney Agnes L. Navas Dávila, Director of **ARPE**'s Legal Division.

34. Returned with the letter signed by Mr. Marcano Robles were the Preliminary Project Plans, which had been filed with **ARPE** for preliminary review and comment. The Construction Drawings for Site Improvements required by the 1981 **ARPE** Resolution and filed by **PFZ** with **ARPE** on February 22, 1982, were neither returned nor referred to in the letter dated August 2, 1988.

35. On August 17, 1988 and September 1, 1988, in letters addressed to **ARPE** the **PFZ** Engineers and counsel for **PFZ** answered **ARPE**'s letters of August 2, 1988.

36. From February 22, 1982, the date when the Construction Drawings for Site Improvements were submitted by **PFZ** Engineers to **ARPE**, to the date of this Amended Complaint, **ARPE** has failed to process the Construction Drawings as required by law and regulation; **ARPE** has failed to process the Construction Drawings within one year as is its custom and practice; **ARPE** has failed to communicate with **PFZ** Engineers through issuance of comments and request of clarifications in accordance with established customs and procedures; and **ARPE** now refuses to process said Construction Drawings.

37. Defendants' deliberate actions, including the undue delay in processing and illegal refusal to process plaintiff's approved Construction Drawings since February 1983, are arbitrary, capricious and unreasonable, depriving plaintiff of its substantive rights to property, including vested rights, without due process of law.

38. Defendants' undue delays and deliberate refusal to process plaintiff's approved Construction Drawings since February 1983 have deprived plaintiff of its property without procedural due process of law, and plaintiff has no adequate remedy available under the laws of the Commonwealth of Puerto Rico.

39. Defendants' deliberate negation in August 2, 1988 of the 1976 Planning Board Resolution and the 1981 ARPE Resolution and the return of the Preliminary Project Plans without notice or an opportunity to be heard deprive plaintiff of its property without procedural due process of law, and plaintiff has no adequate remedy available under the laws of the Commonwealth of Puerto Rico.

40. Defendants' deliberate processing and treatment of plaintiff's Construction Drawings and Preliminary Project Plans in a manner that differs invidiously from the process and treatment accorded to drawings and plans of others similarly situated deprives plaintiff of its property rights without equal protection of the laws.

41. WHEREFORE, because Defendants, acting under color of Puerto Rican law, have deprived and are depriving plaintiff of its federally protected constitutional rights, plaintiff seeks the following relief pursuant to 42 U.S.C. § 1983:

- (a) Compensatory damages in the amount of \$45,000,000.00 against defendant Rodríguez in his individual capacity, such damages including, but not limited to, the increase in development costs, the increase in construction costs, the increase in financing costs, lost income, lost profits and interest associated with the Project;
- (b) Punitive damages of \$250,000 against defendant Rodríguez in his individual capacity for engaging in conduct demonstrating a reckless or callous indifference to plaintiff's federally protected constitutional rights;

- (c) Permanent injunction prohibiting ARPE and defendant Rodríguez, in his official capacity, from further refusal to process the Construction Drawings and Preliminary Project Plans, and ordering that the Drawings and Plans be processed pursuant to the applicable laws and regulations and established custom and practice;
- (d) Declaratory judgment that defendants' actions as applied to plaintiff's federally protected property rights are unconstitutional;
- (e) Reasonable litigation costs and attorneys' fees as permitted by 42 U.S.C. § 1988; and
- (f) Such other relief as this Court may deem appropriate and just.

CERTIFICATE OF SERVICE OMITTED IN PRINTING

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.,	}	CIVIL NO. 87-01915 (HL)
Plaintiff,		
vs.		
RENE ALBERTO RODRIGUEZ,		
et al.		
Defendants.		

December 16, 1988

Basora & Rodriguez
701 Ponce de Leon Ave.
Centro de Seguros Building
Office 406 — Miramar
San Juan, Puerto Rico

Matter: Tourist Residential Project

Vacia Talega — 71-093 Urb.
78-21-A-698 CPD

Attention: Luis Rodríguez, Eng.
Jose Luis Novas, Att.
Legal Counsel

Dear Sirs:

In relation to your letters of the 17th of August and the 1st of September, 1988 requesting from this agency the reconsideration of the decision that the project in question is no longer in force, Denied.

As is evidenced in the files of this agency, the plans submitted and denominated "construction plans" by the proposers "Basora & Rodriguez," is made up of a set of sheets of plans which correspond to:

1. Sheet No. 1 — is the title and location page.

2. Sheet No. 2 — Situation of the project.
3. Sheet No. 3 — Division of Lots.
4. Sheet No. 4 — Topography and existing levels.
5. Sheet No. 5 — Ground level, building 1 (condo-hotel).
6. Sheet No. 6 — Floor level, condo-hotel building
7. Sheet No. 7 — Typical floor plan, condo-hotel building number 1.
8. Sheet No. 8 — Elevation of condo-hotel building number 1.
9. Sheet No. 9 — Elevation
10. Sheet No. 10 — Floor Plan, ground level condo-hotel = 2.
11. Sheet No. 11 — Typical floor plan condo-hotel #2
12. Sheet No. 12 — Elevation and Section condo-hotel = 2.
13. Sheet No. 13 — Apartment building #1, ground level floor plan.
14. Sheet No. 14 — Basement Floor plan, apartment #1.
15. Sheet No. 15 — Typical Floor plan-apartment building #1.

[vertical]

Commonwealth of Puerto Rico, Regulations and Permits Administration, Minillas Governmental Center, North Building/ Box 41179, Minillas Sta., Santurce, Puerto Rico 00940

Basora & Rodriguez

December 16, 1988

Page -2-

16. Sheet No. 16 — Elevation-Building #1.
17. Sheet No. 17 — Section apartment building #1.
18. Sheet No. 18 — Floor Plans and Sections "Gardens Apartments."
19. Sheet No. 19 — Floor Plans and Sections "Gardens Apartments."

Said plan sheets, in accordance with Planning Regulation Number 3, cannot qualify as the final construction plans for the urbanization works.

Final construction plans are the documents that make the construction of a project viable. Specifically, said plans contain a series of essential requirements, such as:

1. Final construction plans for the electrical energy distribution system, duly sealed by the Electrical Energy Authority.
2. Complete plans for the water distribution systems.
3. The complete plans from the rain drainage system.
4. Construction plans for the drinking water and sewage systems.
5. Final plans for Land and Level Movements.
6. Plans for the final accesses servicing the project and improvements on existing ways.
7. Endorsement of all government agencies related to the project.

The requirements established in the preliminary development approved on February 24, 1981, which expressly establishes a period of one (1) year for the preparation of the construction plans and their submission to the agency not having been met, it is the official position of the Regulations and Permits Administration that the preliminary development to which reference has been made has lost force for all legal effects.

By the reasons previously expressed, the requested reconsideration is declared denied and the previously issued decision that the referred project has lost force is upheld.

Basora & Rodríguez
December 16, 1988
Page -3-

A review of this decision may be established before the Superior Court of Puerto Rico, San Juan Courthouse or in the courthouse the jurisdiction of which encompasses the place where the project is situated within thirty (30) days counted from the date of the deposit in the mail of the notification of the denial of the reconsideration request.

Cordially,

Rene A. Rodríguez
Administrator

RAR/CIC/gcr

SIGNATURE OMITTED IN PRINTING

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.

Plaintiff,

vs.

RENE ALBERTO RODRIGUEZ,
et al.

Defendants.

CIVIL NO. 87-01915 (HL)

ANSWER TO THE AMENDED COMPLAINT

TO THE HONORABLE COURT:

COME NOW defendants, through its undersigned attorneys and respectfully state and pray:

1. The allegation contained in paragraph 1 is a statement of legal conclusion upon which plaintiff choose to state its legal claim and does not require a responsive pleading. In any case defendants deny said allegation.

2. Paragraph 2 is admitted.

3. Paragraph 3 is admitted.

4. Paragraph 4 is admitted.

5. Paragraph 5 and 6 are statements of legal conclusion upon which plaintiff choose to state its legal claim and does not require a responsive pleading. In any case defendants deny said allegations.

6. Paragraph 7 is admitted.

7. Paragraph 8 is admitted.

8. From paragraph 9 the first sentence is admitted. The second sentence is denied. The third sentence does not require a responsive allegation.

9. Paragraph 10 is admitted.

10. Paragraph 11 is admitted.

11. Paragraph 12 is admitted.

12. Paragraph 13 is admitted, but the Resolution makes reference to case number 71-083-Urb.

13. Paragraph 14 is admitted.

14. Paragraph 15 is admitted.

15. Paragraph 16 is denied.

16. Paragraph 17 is admitted.

17. From the first sentence of paragraph 18 it is only admitted that by way of letter dated March 24 1982, ARPE returned the plans for the preliminary project of the structures to be constructed in Block 2 of the project. The second sentence is admitted, but what was sent were the advanced copies for the Preliminary Project Plans.

18. From paragraph 19 the first sentence is admitted, the second sentence is denied as stated.

19. Paragraph 20 is admitted.

20. From Paragraph 21 it is admitted that on September 9, 1986, a meeting was held and plaintiffs were present. There is no evidence of the letter dated August 27, 1986.

21. Paragraph 22 is admitted.

22. Paragraph 23 is admitted. However, the purpose of the meeting was not to discuss the validity and effectiveness of any Resolution.

23. Paragraph 24 is denied as stated; construction drawing for site improvement were never submitted.

24. From paragraph 25 the first two sentences are admitted. The third sentence is denied as stated.

25. From paragraph 26 it is admitted that a letter was received by defendant Rodríguez from PFZ engineers requesting such information. The second sentence is admitted.

26. From paragraph 27 it is only admitted that on November 20, 1987, preliminary project plans for the structures of Block #2 ("ante proyecto edificaciones") were submitted.

27. Paragraph 28 is denied for lack of information upon which to form a belief.

28. Paragraphs 29,30,31,32, and 33 are admitted.

29. From paragraph 34 the first sentence is admitted. The second sentence is denied.

30. Paragraph 35 is admitted.

31. Paragraph 36 is denied as stated.

32. Paragraph 37,38,39 and 40 are denied.

33. Paragraph 41 contains statements of law upon which plaintiff choose to state its claim and does not require a responsive pleading. In any case, defendant deny said allegation.

AFFIRMATIVE DEFENSES

1. This case is not ripe for adjudication since the plaintiff has not submitted the necessary final construction plans to effectively evaluate the project and make a final determination.

2. ARPE has been unable to grant the permits necessary for construction due to plaintiff's lack of compliance with ARPE's requirements.

3. In order to evaluate and approve the Project, the endorsement of several governmental agencies is needed. Not all of the agencies involved have endorsed this project. Without these endorsements ARPE cannot evaluate or approve the project.

4. The complaint fails to state a claim against defendant, upon which a relief can be granted under the provisions of the Fifth and Fourteenth amendments to the United States Constitution of the United States or under the applicable laws of the Commonwealth of Puerto Rico.

5. Defendant acted at all times according to law and in good faith, therefore, he is entitled to the protection afforded by qualified immunity.

6. In the hypothesis that plaintiff is entitled to any relief, which defendant denies, plaintiff is not entitled to recover punitive damages.

7. Any claims for damages and equitable relief against defendant, for acts and conduct in his official capacity are barred by the Eleventh Amendment.

8. The complaint is time barred.

WHEREFORE, defendant prays to this Honorable Court that the Complaint be dismissed and that plaintiff be charged with costs and attorney's fees.

CERTIFICATE OF SERVICE OMITTED IN PRINTING

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.

Plaintiff,

vs.

RENE ALBERTO RODRIGUEZ,
et al.

Defendants.

CIVIL NO. 87-01915 (HL)

EXCERPTS FROM THE DEPOSITION OF LIONEL
MOTTA GARCIA (JUNE 13, 1989)

[15]

* * *

Q If I understand your testimony correctly, prior to 1975 the Planning Board had two basic functions. One in the concept basis, as to what use was going to be given to lands in Puerto Rico, and the other one would be the operations — technical area?

A In general terms, that is so.

Q In your own words, could you tell us what each of these sections or divisions consisted of, the conceptual or concept area and the functional area?

A Well, one is the planning area, which is where one

[16]

visualizes what should be, such as the creation of a master plan, the zoning districts in Puerto Rico.

And when we say the "master plan," we talk about the infrastructure, the access and the operations area as the one

that deals with the technical aspects, exclusively, of the projects.

Q Well, when you say the "technical aspects," are you telling us that by then you were dealing with specific aspects of projects?

A Yes, we're talking about plans, per se. And when we say "plans," we're talking about the preliminary plans and the construction plans.

Q And when you talk to us of "site plans" and "construction plans," you're already talking to us about plans relating to a specific construction site?

A Yes, that is correct.

Q And this is the so-called operations aspect of the Planning Board up till 1975?

A Yes.

Q And this is the function that is to be assumed by ARPE upon its creation in 1975?

A Right.

[23]

* * *

Q And this review process, what did that entail, what was done physically?

A All the technical details were reviewed to ensure that they complied with the applicable regulations in force.

Q Was there any communication with the professional and the project owner or the person who had presented the plans?

A Yes, sir.

Q And what type of communication was this?

A Once the plans were reviewed, the deficiencies or corrections to be carried out were noted, and the person who presented the plan was notified.

Q And for what reason were these deficiencies brought to the attention of the proponent or the —

[24]

A So that he would proceed to make the necessary corrections on the plans before they were approved.

Q And once these corrections were made, the proponent then submitted corrected plans?

A Yes.

Q And this process of correction and notification of deficiencies, did this occur all at once, or did it occur over several occasions?

A It could occur on more than one occasion.

Q Could we then say that this was a continuous process where the project owner would submit the plans, he would receive the notations and make the corrections, return and receive perhaps more corrections, until it was finally approved as a construction plan?

A Yes.

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[32]

* * *

Q This letter of January 27, '86, you did receive it?

A Yes, I must have received it.

Q And it came to your attention?

A Yes, I assume so. That's why I called for the first meeting.

Q And in relation to that letter it is that you called for the first meeting?

A Yes.

Q And what was the purpose of that so-called first meeting?

A Once I see the letter and I realize that we're talking about a case that had been filed in the agency four years previously, and considering that it was a project that had first come to the consideration of the Board sixteen years before that, I felt it was necessary to have a meeting with all the agencies involved in this project.

[33]

to hear their comments and to see if the conditions that existed at the time of the filing of said project were still applicable or were still in force.

Q What was before the consideration of ARPE in January of 1986?

A According to the letter, construction plans for the — I'm sorry.

MR. MANGUAL: Let the record show that at the previous translation, where it says "construction plans," it should state "construction of the development of the works related to Block No. 2."

BY MR. NOVAŠ:

Q Could you tell us in what consists of the development plans of an urbanization under construction?

A Those plans should contain the design of the storm sewers, electrical facilities, sanitary facilities, hydraulic, design of streets and earth movements. That is basically it.

* * *

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* * *

Q Now, do you have firsthand knowledge of what the plans were that were submitted back in February of

[36]

1982?

A No, I have no first — personal knowledge.

* * *

[38]

Q That first meeting of February 19th, was that carried out?

A Yes.

* * *

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Q Do you have any recollection of what happened during the course of that meeting?

[40]

A At that meeting we spoke of the project.

And let me say this, I couldn't state, at this moment, at that meeting we spoke of this or that. As a matter of fact, minutes were not kept of the meeting, and probably, there not being first-level personnel at that meeting, and since no agreements could be reached, that may possibly contribute to the fact that I don't have a recollection of what transpired at that meeting.

But I know that we did ask that the official position of the agencies be put in writing.

Q The official position of the agencies in regards to what?

A In regards to the Vacia Talega project.

Q And those agencies that were present at that meeting, did they comply with your request to submit in writing their position?

A Not all of them. As a matter of fact, if I recall, if any of them answered it was very few of them.

Q Do you recall if during that meeting any specific plans were examined?

A I don't recall.

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* * *

Q And the April 3rd, 1986 letter, what is it?

A It is possibly the letter that I may have sent to the agencies for the original meeting, where I'm requesting of the heads of agencies — granting them 30 days in which to put forward their official position related to the project.

Q Did you receive any answer to these reminder letters that you sent to the agencies?

A I couldn't say, because I didn't deal directly with the projects. I didn't get involved in the design and regulation — and review of the projects.

And as such, if there was any

[42]

correspondence that arrived, it would go to the person in — who had the case under his care, under his charge.

* * *

[44]

* * *

MR. MANGUAL: Let the record show that that document is being marked as Deposition Exhibit M-7, the original Spanish as well as the English translation thereof.

(Whereupon Motta Deposition Exhibit No. M-7 was marked for identification.)

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* * *

Q This report of August 18th, 1986, which is referred to the special aide to the Governor, Mr. Luis A. Rivera Cabrera, does it point out anywhere that there's any kind of a problem concerning the project that is presently before ARPE — with the processing of the project presently before ARPE?

A From a reading of the document, that is not revealed, or it doesn't show that.

But this is just a relation of the status of the project, an update.

Q If there had been any objections to the project, or any considerations — additional considerations, that would have been included in the report to Licenciado Luis A. Rivera Cabrera?

A Yes, it may have been.

Q That is, if there had been any major obstacle or hindrance to the carrying out of the project, it would have been mentioned here, right?

A It could have been, but it has to be kept in mind

[47]

that at this time the great majority of the agencies had not expressed themselves, so it could have been.

Q Yes, but as of that date, as of August 18th or 27th, '86, if there had been any major obstacle to the project, it would have been presented there?

A I would say so, if there were anything of particular interest, it would have been expressed there.

Q This second meeting that we've been speaking of, was it carried out?

A Yes, sir.

Q When was it carried out?

A I can get the date from here.

It was on September 9th, 1986, in my office.

Q And at this second meeting of September of '86 was where you indicated to us that these agency heads and technicians had been present?

A Yes, that's correct. The heads of departments, secretaries, and heads of agencies.

Q On the second page of this letter to Attorney Rivera Cabrera, you outline what the purpose is of the meeting. And making reference to the letter so that you can refresh your memory, what was the

[48]

purpose of that meeting?

A From a reading of the document, we can obtain several items, or several things. In the last letter of that — paragraph of that page number 2, it indicates that for the purpose of facilitating or making easier the endorsements which are

still outstanding, that can be interpreted that way, but it says something more.

* * *

[49]

MS. ROJAS: It's a cross between expedite and facilitar. (Whereupon there was a comment in Spanish.)

MR. MANGUAL: All right, Para — all right. Let's amend that translation, by consensus, that it is to expedite.

A And in addition we're stating that we're having that meeting to make it easier for those heads of agencies to present their comments and all the official positions so that we could then proceed to consider the evaluation of the construction plans under our consideration.

So that what we were trying to do was get the comments of the different agencies so that then our agency could go ahead with the evaluation of those plans.

* * *

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* * *

Q During this consultation process that was carried out during 1986, in which all these heads of agencies and offices of ARPE participated, do you recall there having been raised the question of the

[54]

sufficiency of the plans submitted for the consideration of ARPE?

A No, not at the meetings.

Q And outside the meetings? Other than the meetings?

A I believe I asked at one point Engineer Marcano in this regard, and my recollection is that he told me that there was — there were some incomplete plans.

Q Do you recall approximately when was it Engineer Marcano made this comment?

A I assumed it was after the letter of Basora & Rodriguez inquiring concerning the status of the case.

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Q According to what you previously testified, you withdrew or retired from public service back in February of 1987.

At the time of your retirement from public service as Director of ARPE, had a

[57]

final determination been made of the plans under the consideration of ARPE for this project?

A No.

Q Had any preliminary determination been made concerning those plans under the consideration of ARPE?

A Not while I was at the agency.

Q Aside from these comments related to some possible incomplete plans made by Cruz Marcano, do you — did — at any time prior to your retirement in February of 1987, was any substantial objection made to the sufficiency of the plans?

A No.

* * *

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* * *

Q Since when do you know the attorneys from Basora & Rodriguez?

MS. ROJAS: Excuse me, attorneys or engineers?

MR. MANGUAL: Engineers.

A Long ago. Twenty years.

[62]

BY MS. ROJAS:

Q Do you know them personally?

A Yes.

Q Do you know Jack Katz personally?

A No, but — I know who he is, but I don't know — if I met him now, I don't know who is Jack Katz.

Q You've met him before?

A Yes.

Q Would that be during the time that you were Administrator of ARPE?

A Yes.

* * *

[63]

* * *

Q Considering your experience in ARPE on the Planning Board, how long do you think this project would have taken to review, once the drawings or the plans were submitted?

A If the projects are submitted completely, with all the elements for a judgment, a technician from ARPE could have had comments at that time four, five, six months afterwards.

And, of course, that does not include the part that corresponds to the different agencies.

Q When you say "when the projects are submitted completely," what do you mean, specifically?

What constitutes that the project is submitted completely?

A That all the required documents are present, and

[64]

that what is being submitted complies with the regulations and the provisions of the Planning Board.

Q If the resolution issued by ARPE approving preliminary development contains certain documents that have to be submitted at the same time the plans are submitted, could it be said that if those documents are not submitted, the project is not complete?

A That's possible; you would have to examine them case by case.

If there are documents that are necessary for the review of the case itself, then, of course, that affects it.

* * *

[67]

* * *

BY MS. ROJAS:

Q Okay. What you said about waiting for the moving party to submit the off-site because it takes time to get the endorsement from the agencies, is that a practice to wait for those plans, or it is a regulation?

A For the construction and use permits of the structures that are going to be built, it's necessary that the off-site facilities have been constructed.

Q But what — I would like to know if it is a practice to wait or to give time to the moving party to submit the off-site plans once he has submitted the construction plans?

A What was then accepted as a generalized practice was that ARPE would approve initially at least the earth-moving stages.

So that the contractor would go ahead in installing the storm sewer facilities, for example, before going on to that, within the earth movement, and that was the generalized practice at the time.

Q Did that practice that place even if the resolution approving the project did not provide for it?

A If the resolution did not permit it, obviously, it

[68]

could not be done.

Q Who determines what agencies from the Government have to endorse a project before ARPE can issue — or approve the final project?

A ARPE.

Q Do you have a knowledge of what considerations ARPE takes in order to include some agencies that are not commonly included?

A For example, which ones?

Q Agriculture Institute or —

A These agencies do have to do with this, as a matter of fact, also the Agency for Historical Preservation — in projects that one understands could affect this situation, it

would require the intervention of the Institute of Culture or the Historical Preservation as to the use of the land.

It's better to have the comments and opinions of more than the necessary number of agents, rather than to do without the comments of a necessary agency.

Q If one of those agencies whose comments are not that necessary do not prove — or establish some obstacles, could you — could ARPE consider those commentaries?

A ARPE can decide not to take it into consideration,

[69]

but it's the responsibility of that agency.

And I personally believe it's not a desired nor common practice.

Q While you were working on the Planning Board, did you ever have any contact with this project in particular?

A No.

Q Okay, you said that you became Administrator of ARPE in January of 1985.

A Right.

Q And if I'm not wrong, it's January of 1986 that Basora & Rodriguez sent a letter to ARPE requesting information about the status.

A Right.

Q Did they ever contact you during 1985 regarding the status of the case?

A No.

Q There were no type of communications?

A I don't remember.

Q Did anybody else question or inquire about the status of the case during 1985?

A No.

Q And it's in 1986 that you first hear about this project in particular.

A No, it's not that I had not heard of the project

[70]

previously, it's just — because that had been going on for a long time — it's just that it was not within the realm of my — the sections that I was supervising.

At the Planning Board, everybody knew the development of the Vacía Talega area, and it was known that it was a very large area that was going to be developed. But with the project specifically, I never had to deal with it.

Q So your first involvement with the project was in 1986?

A Right.

Q Who was the first person that you talked to regarding the project, once you received the letter from Basora & Rodriguez?

A Engineer Cruz Marcano Robles.

Q And why did you talk to him in the first place?

A I referred the letter to him so that he would advise me of the status of what was going on with the case.

Q Did he inform you about the status at the time?

A He told me it was a very old project that had been filed several years ago in 1982, and that ARPE had not taken any action on it.

Q Did he explain at the time why ARPE had not taken
[71]

any action?

A No. He did tell me that there were some incomplete plans.

Q Did he explain why he understood the plans were incomplete?

A No.

Q Did you inquire or request a report as to the plans for the project, to find out what was going on with the project?

A I understood that there were plans filed, and what most concerned me was the magnitude of the project, of the size of the project, and — with the technical aspect, it was easier to deal with.

The difficult part was with the planning field, and we didn't — certainly didn't want to do something which might have been incorrect.

Q But at the time you understood then that the project was in effect.

A I beg your pardon?

Q At the time in 1986, when you talked to Marcano, after he tells you that the plans were incomplete but were there, did you understand that the project was in effect, "vigente"?

A I understand that they were in effect and that if

[72]

the plans had been filed on time and the other measures had been taken —

(Whereupon a break was had, and the following occurred:)

MR. MANGUAL: Okay, left out of the translation previously, and it's the section where it says that "and if any technical data is missing, it's just a question of obtaining that information and incorporating it into the report."

Now we can go back to the questioning.

BY MS. ROJAS:

Q What do you understand as plans that have been filed that interrupt or toll the period the moving party has to submit the plans — or submit the final plans?

A Submitted plans for my interpretation of the data that is being given to me and the plans provided to me are the plans which the contractor must file.

Q I'm talking about the one-year period the moving party has to submit the construction plans.

A That's the period that they have, one year, in which to submit the plans.

* * *

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* * *

Q After talking to Cruz Marciano in relation to the project, and every time I mention the project I'm talking to the one that concerns us, did you talk to anybody else or consult anybody else inside ARPE?

A No.

Q So, we could say that you talked to Cruz Marciano and then by — you decided on your own that there had to be a meeting or that you needed to know about the position of the agencies.

A First the agency head is not going to be involved in individual projects. If he has the responsibility of administering such a large agency with ten regional offices, he could not get involved in individual projects.

Mr. Engineer Marciano was the Director of Regional Operations, and in that area it was that they dealt with this type of a project.

[76]

Cruz Marciano was a Regional Administrator — I'm sorry, an Assistant Administrator of the agency — and the Administrator does not have to get involved in this. It was handled at the level of Cruz Marciano, as Administrator, to make the decision.

And, as I said, nevertheless, because of the size of the project and the time that it had been in the agency, it was then that we had decided on the opinions of other agencies which may have had input into the case.

Q When you say, "we decided," to whom specifically are you referring?

When you decided to go to the agencies?

A Basically, that was Engineer Marciano was the one that knew the case better.

Q Do you remember anybody else that took part in that decision?

A No. On the decision, nobody else.

Q How many meetings did you hold with Engineer Marciano prior to deciding that you had to conduct a meeting — that you needed the endorsement of the agencies, or their opinions?

A Maybe one, I don't know. Maybe one.

* * *

[77]

* * *

Q Do you remember what was discussed during that meeting — that first meeting that was held in 1986?

A What was discussed?

Q Yes.

A The other question was posed to the heads of agencies present and they were requested to submit their comments logically at that time, because since there was no head of an agency present at that meeting, none of those present was going to adopt the official position of the agency.

And then they were requested to put in writing the official position of the agency.

Q Prior to that meeting, did you check the status of the case as to looking into a file —

A No.

Q Okay. Did you consult anybody else as to what needed to be discussed in the first meeting of 1986, besides Cruz Marciano?

A No, I don't remember.

Q After that meeting, did you talk to Basora &

[78]

Rodriguez about what had happened at the meeting?

A No, I don't remember talking —

Q Did they inquire, or were they informed that a meeting had been held, that first meeting in 1986?

A I don't remember if they asked or I told them. I think so.

Q Did you discuss the case with Rene Rodriguez during the first meeting, or in the time that —

A I think Rene Rodriguez was present in the meeting, that first meeting. I think both — he was present in both meetings.

Q But did you discuss the case with him at the time?

A I don't think so.

Q Do you remember what was the responsibility of Rene Rodriguez regarding the project at the time of the first meeting? If he had any?

A Responsibility with the project? No.

Q When you say "No," are you referring that you don't know if he had any responsibility, or that he did not have it?

A No, he did not have any responsibility.

Q Why did you decide to have a second meeting?

A Because the agencies did not answer to the second meeting — to the first meeting.

First, the agency heads were not

[79]

present, they sent representatives. And subsequent to the meeting, they did not communicate with us to express the position of that agency.

And I thought — we decided to have a second meeting and to request the direct participation of the heads of agencies.

Q Who are you referring to when you say that "we decided to have a second meeting"?

A I mean ARPE, the agency.

Q What other members of ARPE besides yourself were involved in that decision?

A Marcano, possibly Rene Rodriguez — I don't think anyone else.

Q You don't remember for a fact that Rene Rodriguez was involved in that decision of having a second meeting?

A Well, he was the Deputy Director of the agency, so I invited him to every meeting. Almost every meeting, he attended.

Q So, you're saying that most probably you talked to him about having a second meeting?

A It's possible.

Q Who decided to invite Basora & Rodriguez to the second meeting, or how did that come about?

A I'm not so sure, but I imagine that they offered to

[80]

Marcano to make that type of presentation.

MR. NOVAS: No, "The truth is that I don't know because it was not —"

(Whereupon there was an exchange in Spanish.)

MR. MANGUAL: "But the fact of the matter is, I know that it was not with me."

BY MS. ROJAS:

Q But who informed you that Basora & Rodriguez were going to make a presentation in the second meeting?

A It must have been Marcano.

Q Do you remember if Virgilio Gautier was involved in any of these meetings or —

A Whom?

Q — precautions?

Virgilio Gautier.

A I don't remember.

Q Do you remember if Engineer Jorge Colon was involved in any of these meetings?

A With Jorge Colon, it's possible, because he worked with Rene Rodriguez and with Marcano, with Cruz Marcano, on the plans. It's possible that he — that is, he dealt directly with the plans.

* * *

[81]

* * *

Q What happened after that second meeting, did you discuss with the members of ARPE what was your — what were you going to do with the project at the time?

A No. After that meeting, we waited for the agencies to give us their official position, so that we

[82]

could then review and make the — whatever determination was appropriate.

Q For that second meeting in 1986, did you check the status of the case?

A No.

Q Did you request anybody to check the status, or if Basora & Rodriguez had complied with all the requirements?

A No.

Q Do you remember if after that second meeting Basora & Rodriguez called you to inquire about what had happened or about what was the position of ARPE?

A No.

Q Why did you send a letter to the Office of the Governor in relation to the status of the case?

A The truth is, I don't recall.

It's possible that Attorney Rivera may have called me and may have asked me about the status of the case, and I may have sent him that letter informing him or reporting the progress or status of the project.

Q Do you remember who prepared that letter?

A It must have been Engineer Marciano.

Q Did you discuss the contents of that letter with Marciano and anybody else from the agency?

[83]

A It's possible I may have discussed it or commented it with Marciano.

Q Do you remember signing that letter and sending it to the Office —

A No, I don't remember.

Q Will you please explain why do you state in that letter that the project was in effect?

A As I said, that letter was drafted by Engineer Marciano, and since he's the person in charge of the revision and approval of the plans, I understood that to be so, the project was in force.

Q Why were you so interested in expediting the endorsement of the agencies in this case?

MR. MANGUAL: Interested in what?

MS. ROJAS: Expediting the endorsement of the agencies.

A The basic function of ARPE is to resolve or rule on the cases as expeditiously as possible. And projects of this size, because of their impact, their size, the time before the agency, I understood required resolution one way or another.

BY MS. ROJAS:

Q Was it the duty of ARPE to request the endorsement of the agencies, or was it the moving party's duty and responsibility?

[84]

A Previously, it was the proponent who had the task of getting the endorsements from all these different agencies, one from Electrical Energy Authority, the Aqueducts and Sewers Authority, and then he would bring those endorsements to the agency.

And now with the approval of the certification, what is done is that that is certified at that agency and those agencies do the certification of the part that corresponds to them.

Q Could you please be specific as to the time the new law commenced to apply?

A The certification law entered into effect in, I believe, 1976, and at that time it covered just the construction permits for structures.

Subsequently it was determined that the same responsibilities should be requested of contractors in the case of urbanizations, and the law was amended to include also urbanization projects. And I believe that was sometime between '82 and '84.

Q After that second meeting, what was the position of the agency as to the project?

A Not at this time, because we were waiting for the agencies to send us their opinions.

[85]

Q But once you received the opinions of the agencies, what was the position of the agency?

A Well, the fact of the matter is that after that second meeting I was no longer involved in the case.

Q Will you please make reference to Exhibit M-7.

It mentions in page 5 that a meeting was conducted in ARPE and the project was discussed, including the different agencies' commentaries.

Do you remember being present at that meeting?

A According to this, I must have been present, but I don't recall this meeting.

Q So, you don't remember being involved with the project after the second meeting?

A Right.

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Q You mentioned that a new law of certification was put in effect.

A The original was amended.

Q And did that law determine how a case would be reviewed from that time on?

A Yes.

Q Do you remember if the projects that had been submitted previous to 1984 were given the opportunity to use that new law as their review process?

A It's possible that the law may have provided that alternative, but I couldn't certify it.

Q But it could not be stated for a fact, then, that a project was under one law or the other, referring to the previous law and the new law, if you didn't check or if they didn't ask for it?

A No, it's not possible for the law to provide that whatever is under this section should adapt itself to the new law.

It's possible that it may have provided that anyone that had a case pending could have withdrawn it and presented it under the new

[87]

law. But if the case is already filed, ARPE had the obligation to continue reviewing it under the previous law.

Q I want to make reference to Exhibit M-10, which is the letter that Rene Rodriguez sent to Plaintiff in this case.

Okay, the second page refers to final construction plans, and it says that, in order to make the project viable, you would have to comply with these seven requirements.

Do you understand that this is correct, that information that is included in this letter, to the best of your knowledge as Administrator?

A Yes, correct.

Q So, before ARPE could make a final decision as to approving the project as a whole, all these requirements had to be met, within the year that the preliminary development resolution was — gave the moving party?

A Yes. For ARPE to approve construction plans, it would have to include this information.

* * *

[88]

* * *

Q If Marcano had told you in 1986 that he understood the plans were not complete, why didn't you order that type of action that you just mentioned?

A That was not one of my functions.

I understood that if it did not meet at the time of the filing, they should have been returned in 1982 and not wait until 1986.

Q But if the requirements had not been met by 1986, wasn't it your duty to return the plans?

[89]

A I did not review plans. I understood that if there was anything wrong, it was Marciano who had to return them.

Q And why was it Marciano's duty to return the plans if they were not complete? Why was it his duty?

A Because the authority to approve or refuse plans was in his jurisdiction, the jurisdiction of the office directed by Marciano, to approve or disapprove.

* * *

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* * *

Q Then is it a fact that you did not check whether the project was complete and decided to hold the meetings regardless?

A Of course, if the — since the person that's in charge of that does not tell me, I assume that they're just pending some permits or something that can be cured or —

Q Why after conducting these meetings didn't you reach a decision or tell somebody to reach a decision as to the office in charge?

A I beg your pardon?

Q Why didn't you reach a decision or discuss with Marciano or the office that had the case in charge to reach a decision as to the status of the case?

A Because we could not reach a decision until we had the comments of the agencies involved.

Q But as far as the records show, those commentaries were received in 1986 while you were Administrator.

[91]

A Since the meeting was in September of '86, I don't know when the comments of the agencies arrived, since I did not have any involvement in the case and then I retired.

Q So, you left the responsibilities for somebody else to — or for whoever was going to succeed to you to reach a decision.

A I did not shy away from the responsibility. If I had had the slightest doubt that the case should have been returned, you can be sure that I would have returned it immediately.

Q Before leaving ARPE in 19 — at the beginning of 1987, did Basora & Rodriguez inquire about the status of the case — Basora or Plaintiff?

A Not to me.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.

Plaintiff,

vs.

RENE ALBERTO RODRIGUEZ,
et al

Defendants.

CIVIL NO. 87-01915 (HL)

EXCERPTS FROM THE DEPOSITION OF VIRGILIO
ENRIQUE GAUTIER-RÍOS (June 14, 1989)

[15]

• • •

Q Have you ever discussed the lawsuit with Cruz Marcano?

A Perhaps in general aspects, there's a suit in this case, et cetera.

Q So you may have had some discussions with Mr. Marcano about the suit in general?

A No, not in regard to the suit. In regard to the case, yes, but not in regard to the suit. In advisement.

Q You mentioned that you may have talked to Mr. Marcano about the case, is that correct?

A That was a case that was discussed in the office.

Q Is that the case relating to the Vacía Talega project?

[16]

A Yes, sir.

Q Do you recall discussing with Mr. Marcano the Vacía Talega project?

A Yes, aspects concerning the status of the case, not officially —

(Whereupon there was an exchange in Spanish.)

MR. MANGUAL: The translation on vigencia, we're modifying it to the status or the standing — legal standing.

Vigencia — status, to me vigencia is status or present state.

MR. NOVAS: It indicates it is in effect or not in effect.

MR. MANGUAL: Legal —

MR. NOVAS: The problem is that it's reflected to something else.

MR. MANGUAL: The effectiveness or —

MS. ROJAS: Would be like whether the project was in effect.

MR. MANGUAL: Was in effect. Okay.

A Because in my dealings, I had to wait until that case, or the effectiveness of that case was decided

[17]

upon. It was my responsibility to await it.

MR. NOVAS: Tom, let me clear up. Just to have the record clear, he's talking — when he's using the word "case," he's talking not only — sometimes he's referring to this lawsuit and sometimes he's referring to the procedure that was pending in ARPE.

MR. RICHICHI: We'll sort that one out.

BY MR. RICHICHI:

Q So, you've spoken to Mr. Marcano, then, about the Vacia Talega case?

A Logically.

Q Have you spoken to him on a number of occasions about the case?

A The necessary times. Sometimes we've met to discuss the case, perhaps on counseling, perhaps on procedure of the handling of the case.

* * *

[18]

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Q Mr. Gautier, you mentioned that you were currently the Director of Program for Technical Review at ARPE?

A Yes, sir.

Q In that capacity, who do you report to as your immediate supervisor?

A At the present time?

Q Yes.

A Engineer Salvador Arana.

Q He is currently the acting Administrator of ARPE?

A Yes, sir.

Q So, you report to the boss at ARPE?

(Whereupon there was a comment in Spanish.)

BY MR. RICHICHI:

Q I guess that means yes.

Who held that position before Mr. Arana?

A Engineer — or attorney Rene A. Rodriguez.

[19]

Q Mr. Rodriguez is an attorney?

A Yes, I understood that to be the case.

Q He is also an engineer?

Okay.

And Rene Rodriguez was the prior Administrator of ARPE?

A Yes, sir.

Q Was he the Administrator during this period when you were drafting the correspondence we've been talking about?

A Yes, sir.

Q And you reported directly to him?

A Yes, sir.

* * *

[23]

* * *

Q If you can give me an approximation it will be fine, but approximately when do you think you first heard about the Vacia Talega project?

A As soon as I entered ARPE, or a short time thereafter. Because I was in the Operations Area, Regional Operations. So that would have been shortly after August of 1985.

* * *

[27]

* * *

Q I think we've got that all straight.

I'd like to go back now to this period in August of 1985, approximately, when you said you came to ARPE.

Do you recall who was the Administrator of ARPE at the time that you came to the agency, or the adminis — the time you came to ARPE in 1985?

A Engineer Lionel Motta Garcia.

Q Did you report directly to him?

A I was Deputy Director, I was in the Operations Area. I would report to him or to Engineer Marciano. That was for a period of about a year, less than a year.

* * *

[34]

Q When you came on to ARPE, you were learning about the agency and your responsibilities, is that correct?

A Yes, sir.

Q And one of the individuals who would have provided you with information as to how ARPE functioned and operated was Mr. Marciano?

A Logically, since I had worked in the Planning Board, I was familiar with the functioning, but —

(Whereupon there was an exchange in Spanish.)

A Upon my arrival at ARPE, I was Special Aide to the Administrator, I knew the procedures, the regulations, but since I had not dealt with it for some time, I was putting myself up to date, and I didn't know the background of the cases that were — didn't know the method of operation, because it was a new agency for me.

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[36]

Q That's a term I'm interested in. I've heard it a number of times in the case, "construction plans."

Can you explain for me what you understand "construction plans" to be?

A All plans which contained the details regarding a construction project — this is my definition — which contains all the elements that have to do with a construction project.

Q Could those be construction plans for urbanization works?

A Yes, sir.

Q Are you familiar with that term?

A Yes.

Q Could "construction plans" include construction plans for subdivision works?

A The construction plans could include the subdivision — for example, the plan for land which is the urbanization plan, and it includes other elements besides the subdivision.

Q Construction plans for urbanization works, what would those typically include?

A Public lighting plans, if it's available, the elements contained in the works, if it has sanitary or sewage — everything that that entails. For aqueduct, for roads, earth movement, any other work

[37]

related to the project.

* * *

Q I take it that one of the functions of ARPE is to review construction plans for urbanization works?

A At the present time they're certified, but they are subsequently reviewed on a spot check basis, or haphazardly.

Q Certified by whom?

A The professionals that submit the plans certify them, and then ARPE gives them the permit.

Q In other words, there may be a professional engineer or architect who is working for the proponent of the project who certifies —

A The engineer of the project will be able to sign it, and could have several different specialties, and the specialists that participate sign it.

Q Has this always been the procedure at ARPE?

A I understand that at a given point in time it was changed. It's from a certain period of time to this date.

Q Do you know when approximately it was?

A To my understanding, in '84, somewhere around

[38]

there.

It was in '85 — in '85 — in '84. In '85 that was already in place.

* * *

Q Which Board were you referring to?

A The Planning Board.

Q That's the group that you had worked for prior to 1973?

A Yes.

* * *

[39]

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Q I got a little bit sidetracked here. Let me go back to my question about the construction drawings and — for urbanization works.

If I had a set of construction drawings here for urbanization works on the table, would you as an engineer be able to identify those readily as such construction plans?

A Yes, if they're construction plans, yes.

* * *

[42]

* * *

Q So, such an engineer could look at the schedule of drawings and tell immediately that those drawings were construction drawings for urbanization works?

A He has to review all of them.

In the certification of projects, which is the one I'm most familiarized with, the project engineers would hand you a prepared — and say, "Here it is, certified, give me the permit." They're not reviewed.

MS. ROJAS: Excuse me, on the record, I would like to specify that when it showed — he showed that the plans are rolled, are made in a roll.

MR. MANGUAL: Let the record so show.

BY MR. RICHICHI:

Q That wasn't my question. Let me see if I can —

If an engineer who works with construction drawings at ARPE were to unroll the documents, and there was a schedule of drawings for

[43]

a particular set of plans, the schedule, should he be able to make a determination whether those would appear to be construction drawings for urbanization works?

- A Well, if he's going to review them, he's got to review all of them in order to determine if they're correct or not.
- Q Is your answer that yes, he could determine that those were construction drawings but then he would need to review them —
- A If he's going to review them — they bring me a set of plans and I can say, "Here it is construction plans," a set of construction plans, but they could be wrong or bad or they may be incomplete.
- Q But by looking at the schedule of drawings, you would know that they are being represented to you as construction drawings, is that correct?
- A I can't answer that question because it's not clear.
- Q What isn't clear about it?
- A I simply state that I can identify some construction plans, I can identify them, they are construction plans, they can be good or bad, I can identify the good or the bad ones if I have the knowledge of the matters mentioned in the plans.

[44]

* * *

- Q Are you familiar with the term "preliminary project plans"?

- A Yes, I'm familiar with the term of preliminary.

(Whereupon there was an exchange in Spanish.)

MR. MANGUAL: Okay. The concept — and this is my translation of "anteproyecto," "preliminary draft," and — preliminary development and construction plans, I'm not familiar with the term, to call that term in

[45]

English. In the literal translation.

MR. RICHICHI: I'm going to have that again. I didn't catch that.

MR. MANGUAL: Okay. He said that "anteproyecto," and I translated it as "preliminary draft" or "preliminary plans," and preliminary development and construction plans, I'm not familiar with that term, with its equivalent in English.

BY MR. RICHICHI:

- Q Are you familiar with the term "anteproyecto"?
- A Yes.
- Q What does that mean?
- A It's a set of plans which show some details of a project in general terms, so that it can be evaluated in terms of its conformity with the zoning regulations.
- (Whereupon a break was had, after which the following occurred:)
- Q Mr. Gautier, before the break we were talking about plans which had been referred to as "anteproyecto."
- A Yes.

- Q I want to make sure I understand what you meant by those. You said there would be a set of plans which showed some details of a project in general

[46]

terms, so that it could be evaluated in conformity with the zoning regulations, is that correct?

- A More or less, that's the general principle.

Let me see if I can correct that a little.

In general details or certain details, which are specific, that have to be there.

- Q Does ARPE involve itself in determining what use will be made of land?

- A Precisely, in the zoning regulations. That's why I mentioned it. That in the preliminary project, its purpose is to determine if its use fits within that regulation. With the zoning regulations.

- Q Does the Planning Board make zoning determinations?

- A They're the ones that deal with zoning in Puerto Rico.

- Q So, the Planning Board would make decisions as to policy, as to how particular lands would be used?

- A Yes.

- Q And the "anteproyecto" which you referred to can be used by ARPE to make a determination or an evaluation whether a project is in conformity with the land use decision that has been made by the Planning Board?

- A Yes.

[47]

- Q In the course of your experience at ARPE, have you had many opportunities to review "anteproyecto" plans?

- A Yes.

- Q Is it fair to say that you personally would not confuse "anteproyecto" construction plans for urbanization works?

- A No. No doubt.

- Q No doubt.

I take it the differences would not be subtle differences.

- A There's a significant difference between one and the other.

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- A I can identify some plans. If I review them, I can identify them.

- Q Do you know a gentleman by the name of Jorge Colon Miranda?

- A Yes.

- Q Is he an employee of ARPE?

- A Yes.

- Q What area does he work in?

- A In the Regional Operations Area. Division of

[49]

Construction Plans.

Q Is it your understanding that he would have familiarity with construction plans for urbanization works?

A Yes.

Q Is it fair to say that he would have an opportunity to look at construction plans for urbanization works on a daily basis?

A That's the function of that office, to issue construction permits.

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Q Have you ever seen this March 24th, 1982 letter before today?

A Yes, sir.

Q When was the last time you saw this letter?

A Sometime in 1988. I don't recall when was the last time exactly. June, July, but I don't recall the exact date.

Q What were the circumstances in which you came to review this letter?

A We were discussing the — whether the project was in effect, of this case and that.

Q Who is included in the term "we"?

A Engineer Cruz Marcano; and Pedro Juan Sanchez, the Administrator — the Deputy Administrator; Engineer Rene Rodriguez; Carmen Chiquez, Attorney Carmen Chiquez; and I don't recall if Attorney Agnes Navas was there.

We were making a determination as to whether or not the project was in effect.

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Q With respect to that second paragraph of the letter, during the conversation participated in in 1988, July of 1988, did anyone in the discussion

[61]

group mention the fact that there appeared to be two types of plans referred to in the letter?

A What was mentioned is — that is, we asked for the construction plans, and they were presented. They said what they had presented there.

Q When you say, "we asked for the construction plans," the group?

A The people that participated at the meeting.

Q Asked whom for the construction plans?

A Of the persons that had the responsibility of dealing with construction plans who were participating in the group.

Q So some members of the group asked for the construction plans, is that correct?

A Yes, they asked, "Were those plans submitted? Were they not submitted?"

Q What was the response?

A The same, that there was no construction plans, that there were just some plans presented there, some drawings.

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Q Was it suggested by anyone to inquire of Jorge Colon if he knew where the construction plans for urbanization works were located?

A I don't recall, but logically it follows that it should have been asked.

Q So logically it should have been asked, but you cannot recall anyone asking the question, is that correct?

A I can't recall anyone in particular asking the question.

I don't have it recorded of what happened. Well, my role was to determine if the project was in effect and we just considered the documents that were presented, but at no time were construction plans presented.

Q Did you say "at no time were construction plans presented"?

A That at no meeting at which I assisted were there construction plans presented.

Q I see.

In other words, no one within

ARPE ever presented construction plans to you, is that correct?

A I saw no construction plans.

Q So, if someone in ARPE had the construction plans, they certainly didn't show them to you, is that correct?

A I don't know.

Q Well — I don't think you understood my question.

If someone had — assume that the construction plans were at ARPE — if that were the case, they were never shown to you, is that correct?

A No, I never saw them.

Q These construction plans for urbanization works, was it the general view of the group in 1988, July of 1988, that they were important in assessing the project?

A I understand that not to be so, because what we were trying to determine was whether or not the project was in effect.

Q Are you saying that in determining whether the project was in effect ARPE did not care at all whether it had construction drawings for urbanization works?

A To me it was not important.

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Q Were you involved in the decision to determine whether this project was in effect?

A I advised on it, according to my best understanding.

Q And who did you advise?

A Engineer Cruz Marcano and the legal counsel who was there.

I say "advise," and they could advise me also. We advised each other.

Q Who made the final determination whether the project was in effect or not?

A It's a determination that logically it's made by the person under whose jurisdiction the determination — the documentation is.

Q What advice did you give to him regarding whether the project was in effect?

A When a series of documents were presented which I saw, and I gave my opinion with regards to determination that it was not in effect.

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Q When did the discussion of the inactivity of the consultant occur?

A I don't recall. This — I began to participate actively in this case in 1988. And I don't recall, just from the documents presented to me.

Q Are you saying in 1988 someone mentioned to you, in connection with determining whether this project was in effect, something about the inactivity of the consultant?

A No, I reviewed the documents, and the documents presented indicate that there was a period of time in which no inquiry was made as to the project. No inquiry was made of the project.

From the documents seen by me.

[69]

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Q In 1988, July of 1988, you were participating in a determination as to whether this project was in effect, is that correct?

A Yes.

Q And from Mr. Jorge Colon's letter, the — it appears as though — from Mr. Jorge Colon's letter, it appears as though he indicates that construction drawings for urbanization works had been submitted more than six years before.

A And then in 1984, Engineer Pedro Juan Sanchez, as Head of the Construction Plans Division, wrote a letter to the consultant — I don't recall the terms of the letter — and definitely referred to those plans.

And in the documents at ARPE, no reply was received.

Q You're certain that it's Pedro Juan Sanchez?

A I'm sorry, I'm wrong.

I think it was Engineer Juan Maldonado, who was the Director of the Operations Area at that time.

Q As a result of your discussion in 1988, was it determined that the project was not in effect?

A Yes, from my conversations and the conversations of

[70]

everybody present, by consensus, and in addition to other — consultation with other agencies that participate in the process of construction, public agencies who intervene in the process of the approval of a construction plan.

Q Was it determined when the project ceased to be in effect?

A Yes.

Q What was the date that it was determined the project had ceased to have effect?

A On February 24th, 1982.

Q When did Mr. Maldonado — is it Maldonado — when did he write his letter?

A I don't recall the exact date, but I think it was in 1984 — as soon as the process changed from — the approval of construction plans changed, he wrote that letter.

Q Sometime in 1984?

A I understand that to be so.

I couldn't testify to the exact date or year. But to my best knowledge, it was in 1984.

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Q Did you think it was unusual that ARPE would wait six years to determine whether a project was in effect?

A Yes, it's very unusual.

Remember that there were

[72]

different offices working on the case, and the ones that deal with it the most recently deal with it, I understand, responsibly.

Q But it was very unusual, in your view.

A It must be. I imagine if you file a project you want a quick answer. Or within a reasonable time.

And if you don't get an answer, you ask. Which is what is generally done.

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[75]

BY MR. RICHICHI:

Q Have you had an opportunity to read that exhibit?

A Yes, sir.

Q This appears, does it not, to be an August 2nd, 1988 letter on ARPE stationery?

A Yes, sir.

Q It is addressed to Basora & Rodriguez, and is

[76]

signed by yourself, is that correct?

A Yes, sir.

Q And do you recognize your signature at the bottom of the page?

A Yes, sir.

Q And it does indicate that Mr. Rene Rodriguez was sent a copy, is that correct?

A Yes, sir.

Q And this — the document refers to the Vacia Talega project, is that correct?

A Yes, sir.

Q Do you recall reviewing this letter prior to the deposition?

A Yes, sir.

Q Do you recall the circumstances surrounding your drafting this letter?

A Yes. Yes, after the meeting at which the determination was made that the project was not in effect, I

prepared the draft of the letter, assisted by Attorney Carmen Chiquez.

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Q In that second paragraph of your letter, it appears as though you indicate that there had been an analysis and evaluation of documents included in the file of the Vacia Talega project, is that correct?

A Yes.

Q The analysis and evaluation to which you refer, was that performed by you or by someone else?

A The group, previously mentioned.

Q You then go on to mention that it had been determined that the project ceased to have legal validity February 24th, 1982, is that correct?

A Yes, sir.

Q Was that determination made by you or was that made by someone else?

A What happens is that the people who are dealing with the construction plans determined that action, which was determined on the basis of the documents presented at the meeting of the group.

Q You were not dealing with construction plans, were you?

A No, sir.

Q So, the determination was made by people other than

[78]

you, is that correct?

A It was a determination made by consensus of the group, by persons.

Q But were you part of the group when they did the determination?

A Yes, sir.

Q Within the group, was it the people who were dealing with the construction plans that made the determination?

A It was a determination made on the basis of consensus of the group, and it was adopted or ratified by the person in charge of the group, because we were all advising him.

* * *

[85]

* * *

Did it seem unusual to you that you were being asked to make a decision on a case with which you had had very little involvement?

A What happens is, as a staff member, it was thought that I should get involved, or participate in the involvement, as a person well versed in the regulations, although not everybody — nobody has a full knowledge of the regulations.

Q So, at least in part, someone else decided that you should be involved?

A Yes.

Q Do you know who was involved in that decision?

A No, it was the Administrator, it was by consensus, so that would be the Administrator, the Deputy Administrator —

Q The Administrator was Rene Rodriguez. is that correct?

A Rene Rodriguez, the Administrator.

Q The Deputy Administrator then was —

A Pedro Juan Sanchez.

* * *

And there were other persons, Attorney Carmen Chiquez —

Q Any others you can think of?

A I'm not sure, but I think the legal advisor — the

[90]

And maybe with the Deputy Administrator, but I'm not sure, I don't recall.

Q And that was Pedro Juan Sanchez?

A Yes, that was Pedro Juan Sanchez.

* * *

Q Can we agree that in the last sentence in that paragraph, Mr. Rodriguez asks for

[91]

reconsideration of the statements in your August 2nd, 1988 letter as to the effectiveness of the project?

A Yes, sir.

Q Do you know if, in fact, there was a reconsideration that was undertaken by ARPE?

A Well, since the letter was addressed to me and to Cruz Marcano, I understood that what was under discussion were the construction plans, because the "anteproyecto," preliminary plans were not — the

supposed construction plans, because to me the "anteproyecto" was not applicable.

And I referred the letter to Rene Rodriguez and Cruz Marcano, and I understood that the reconsideration before me was inappropriate.

* * *

[94]

* * *

Q Have you seen this letter before today?

A No.

Q Is this the first time you've ever seen this letter?

A Yes.

* * *

Q Having read the letter, do you recall whether you participated in preparing a draft of this letter?

A I participated in the group decision and I returned the preliminary project, and that was it.

Q Do you understand the letter to deny the request for reconsideration that Basora & Rodriguez had made?

A Yes, sir.

[95]

* * *

Q Is it logical, based on your experience at ARPE, to assume that Rene Rodriguez was involved in the determination?

A In this determination, yes, because he signs the letter.

I assume it was brought to his consideration, because as I repeat, I didn't participate in this stage.

Q Given your understanding of how ARPE functions, what other individuals do you believe would have been involved in this determination, besides Rene Rodriguez?

A I assume Ingeniero Cruz Marcano and Engineer Jorge Colon, where the units are located, who deal with construction plans.

This is just a question of identifying plans, whether they're final plans or not.

* * *

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* * *

Let the record show that the exhibit to which reference is being made is a January 21st, 1988 memorandum on ARPE letterhead from Rene Rodriguez, and it consists of — to Rene Rodriguez, consisting of six pages. No, more — eight pages.

And it's been marked as Deposition Exhibit G-6.

BY MR. RICHICHI:

[100]

Q Mr. Gautier, directing your attention to Exhibit G-6, have you seen this document prior to today?

A Yes, I think so.

Q Do you recall when you have seen it previously?

A More or less when I began to intervene in the project. During the — during that time.

Q Were you provided with a copy of this?

A Logically, so that at the group meetings I would be aware of the project, and of the order of events.

Q Okay.

In your earlier testimony you had mentioned a meeting of the group in July of '88 to discuss the — whether the project was still in effect, was that correct?

Do you believe —

A More or less. I don't know the dates, but more or less.

Q Do you believe this memorandum would have been discussed at those meetings?

A We discussed so many documents, we may have. We had it present. For certain, facts from it.

* * *

[103]

* * *

Q Was there anything that led you to believe that Mr. Marcano had copies at some time of the construction plans which Basora & Rodriguez claimed to have submitted?

A I don't know.

Q Your answer is you don't know.

A That I don't know that Marcano had a copy of those plans which Engineer Rodriguez makes reference to.

* * *

[105]

* * *

Q Were you aware that Rene Rodriguez was named as a defendant in that suit?

A Yes, I have knowledge of that.

Q Did Mr. Rene Rodriguez ever discuss the fact that he was a defendant in that suit with you?

A When the plans were submitted to me in November of 1987, I know that there's an ongoing proceeding in the Operations Area with regards to the construction plans, and I do not accept this.

And then afterwards, they followed, but I had already informed Engineer Rene Rodriguez, because he obviously had knowledge of the case.

Q I believe you indicated that he was your superior at that time, is that correct?

A Yes, sir.

Q Would it have been logical for him to give you some direction with respect to your review?

A I repeat, as I stated before, I think I know the procedure, and I know that there were some procedures and some construction plans pending resolution.

And as a person well versed in the proceedings, Rene Rodriguez didn't tell me

[106]

anything — didn't tell me anything. He didn't indicate anything to me.

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[112]

• • •

Q The third name is your name, is it not?

A Yes.

Q I believe earlier in the deposition you had indicated that you did not participate in the preparation of that letter.

A Yes.

Q Do you stand by your prior testimony?

A Well, if I participated, I participated, but I didn't recall having participated.

But if I participated, I don't see anything wrong with that.

Q Well, I guess that's my question.

Do you know whether you participated or not?

A If I participated — if it's there, I participated.

Q What was the extent of your participation?

A With the letter? You mean in regards to the preparation of the letter?

Q Yes.

A I don't know. Something that I may have provided, but only in general terms. Maybe it was just

[113]

taking the draft for me to review. There were different ways.

But I thought I had not participated.

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[114]

• • •

Q And that indicated that you assisted in the preparation of the August 2nd letter of 1988 that was written by Cruz Marciano.

[115]

A That's what I said before, that I may have been taken the draft and as such I participated in some capacity.

Q Okay.

But you don't have any independent recollection of that?

A No, I don't have a lot of recollection. It's possible I may have participated, this is an agency case.

* * *

[116]

* * *

Q Your previous testimony was not — that you had never seen that letter before.

Is that correct?

A I repeat, I may have participated, I may have provided some facts, but I didn't see the letter finally.

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Q And the determination that came out of the meeting was that the project was no longer in effect, is that correct?

A I understand that to be so.

Q And the Administrator agreed with that, is that correct?

A Yes, the Administrator was in agreement.

Q Was there anyone in the meeting who indicated a willingness to disagree with the Administrator?

A In this case it was a subject of considerable discussion. And there were people who had their ideas, but they were all in agreement.

Q When you say "people who had their ideas," what do you mean?

A This is a subject that was the object of a substantial discussion.

* * *

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* * *

Q During the meeting, did anyone express the view that the project was still in effect?

A Yes, there were individuals who so expressed it.

Q Do you recall who those individuals were?

A Engineer Jorge Colon.

Q And the others?

A No, that's the only one I know.

[123]

Q This is the same Jorge Colon who received the construction drawings for urbanization works and wrote the March 24th, 1982 letter to Luis Rodriguez?

A Yes, sir.

Q In the group, he was one of the most knowledgeable individuals about the handling of these construction drawings?

A I'd say more or less we were all well informed, modesty aside.

But Jorge, he had his opinion, but later he became convinced.

Q Who convinced him?

A I was one of the ones that assisted, and I set out my arguments of why it was not in effect. I'm very sincere in that, I don't think I'm committing any sin.

Q So, you assisted in convincing Jorge Colon that —

A I didn't know if Jorge Colon became convinced because of my arguments, but I did set out my arguments, the same thing that I've said here.

I don't know if he was convinced by my arguments. Maybe he went by the arguments of others.

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• • •

Q But your perception was that Rene Rodriguez was one of the individuals in the group who convinced Jorge Colon that the project was not in effect?

A I don't say that. I'm not saying that.

Even in 1986, they were dealing with that project, trying to look for a solution, but it didn't mean that it was in effect. New members of the administration were the ones that began handling that project, and in looking for documents and those things —

Q Let me see if I understand what you're saying.

You said in 1986 they were trying to find a solution for that project.

A When Engineer Rodriguez inquired as to the status, that case was asleep, that was resting. Undoubtedly, and it was put in motion, and different offices or officials began working with it and, as a matter of fact, I was the last one to come in.

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[127]

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Q Did Jorge Colon suggest that ARPE had misplaced the construction drawings for urbanization works which Basora & Rodriguez submitted?

A I have no knowledge of that.

Q Did he indicate whether he thought anyone had taken those plans?

A No, no, I don't recall that he had indicated that.

Q But if there were no plans, then ARPE's position was that the project was not in effect, is that correct?

A No, not in the absence of plans, in the question of procedure that was used it was not in effect.

That's the reason that I gave for it. The question of the procedure.

In other words, to me it was immaterial whether there were plans or not, because since that was not under my consideration, but based on the sequence of effects and the absence of documents — and that's what I saw from the file.

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[130]

• • •

Q It was decided on —

A — but voting on a conscientious basis?

Q It was decided by Rene Rodriguez, wasn't it?

A No, sir.

Q You're certain of that?

A I'm sure of that.

That was an agency decision and consensus by the officers or heads — personnel from the agency —

* * *

[137]

Q I thought you had testified earlier to the effect that you believed Mr. Motta believed the project was still in effect in 1986?

A I think so. But he's one person, and other persons come after him.

* * *

[141]

* * *

Q But I'm referring to the ones ARPE approved for resolutions — for the preliminary development.

A They're given a year.

[142]

That depends on the conditions that are given on the consultation — location consultation, but generally it's one year from the approval of the resolution, the date on which the resolution is notified.

Logically, the proponent, if he has had any problems, can request an extension of time and it would be considered.

* * *

[144]

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Q Does a consultant have to comply with all the requirements that are established in the resolution within the year that is given to submit the final drawings?

A Yes, a resolution in which the conditions for the development are set out and he's given a year to submit the final plans fulfilling those conditions. That's what I understand anyway. I know it's that way.

* * *

[145]

* * *

Q Is there any other stage after the anteproyecto has been approved that the consultant has to go?

A No. Well, it seems to me that the project engineer, if he hasn't done it in the simultaneous — this type of project requires a certain number of endorsements which are submitted with the final plans.

[146]

Simultaneously with the preparation of the construction plans, they can go requesting the endorsements, but at ARPE the next stage is the certification of plans.

Q You mentioned in your deposition that a law of certification was — or there was a change in the certification process, and that a letter was sent to Plaintiff regarding that change in certification.

Will you please explain why that letter was sent?

MR. RICHICHI: I want to, just for the record, interpose an objection. I don't know if you've laid an adequate foundation for the fact that the witness would know why the letter was sent, since he did not author the letter.

MS. ROJAS: Okay, objection noted.

(Whereupon there was an exchange in Spanish.)

- A I wasn't at ARPE, but there is in the file a letter from Attorney — from Engineer Juan Maldonado, who was the Operations Director at that time, wherein he notified the firm of Basora & Rodriguez concerning the change in the portion of the

[147]

revision and informed him that he could choose between the certification of the new plans.

And based on my review of the records, I understand there was no reply to that letter.

* * *

[149]

* * *

- Q So it could be said that in the letter that mentions that the project is no longer in effect, in some way or another you have something to do with that, because you were in that meeting that led to that conclusion?

- A No doubt.

- Q You kept saying that you understood that the project was no longer in effect, not because the construction plans had not been in the file, but because the procedure used was no longer in effect.

Would you please explain your position.

MR. RICHICHI: I interpose an objection, because I don't think it accurately reflects his prior testimony.

MS. ROJAS: He mentioned that once that the procedures that was used was no longer in effect.

I don't have my notes here.

MR. MANGUAL: Your objection is noted.

BY MS. ROJAS:

[150]

- Q You mentioned it once that you did not rely on the fact that the construction plans had not been filed to conclude that the project was no longer in effect.

- A Yes.

- Q Would you please explain what was your position?

- A My position is that it was not brought to my consideration for the evaluation of the construction, therefore the construction plans — the supposed construction plans, since I have no knowledge, my consideration was the inactivity, the documents that were on file, and the resolution of the PJ 139 (sic).

* * *

[151]

* * *

- Q Independently of whether Motta had left the agency as Administrator, a decision had to be made in this case.

- A Precisely, because there was an issue before the consideration of the Board — of the agency.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.

Plaintiff,

vs.

RENE ALBERTO RODRIGUEZ,
et al.

Defendants.

CIVIL NO. 87-01915 (HL)

EXCERPTS FROM THE DEPOSITION OF CRUZ
MARCANO-ROBLES (JUNE 15, 1989)

[6]

* * *

Q Okay. What is your current position with ARPE?

A Assistant — or Deputy Administrator for Regional
Operations.

* * *

[14]

* * *

Q You were — in your new position at ARPE, you
were — was it the Director of the Division of
Permits?

A Yes.

[15]

Q And in that role your section, or division rather,
would issue construction certificates?

A Construction permits.

* * *

[16]

* * *

Q That the certification process for urbanization works
did not come until some time thereafter?

A That's correct.

Q Is that approximately 1984 when that took effect?

A That's correct.

* * *

[17]

Q In your present position, which you assumed in Jan-
uary of 1985, who do you report to?

A To the Administrator.

* * *

Q Let me qualify that just briefly.

Could you describe for me what they were in
January of 1985 when you assumed the job, and
then if there have been any changes, perhaps you
could just describe those.

[18]

A It consists of organizing and supervising the work of
the seven regional offices and of the ten offices — of
the seven regional offices and the three subregional
offices.

In addition to which, it included the review and
evaluation of environmental projects which so re-
quired it.

As well as the Division of Urbanizations, except for the Mayaguez and Ponce regions.

* * *

[20]

* * *

Are you familiar with construction plans for urbanization works in the general sense?

A Yes.

Q Could you tell me what you would understand construction plans for urbanization works normally to include?

A It includes project location, topographic plans — final topographic plans after land movement and

[21]

landfill, includes distribution of lots and the final elevations of the lots, and rainwater current conduits — make that storm sewers.

(Whereupon there was an exchange in Spanish.)

A No, I'm talking about the natural rain runoff — rain flow.

Streets, sections, cross-sections of the streets, street gradients, profiles of streets, final elevations of streets, systems for the disposition of rainwater, storm sewers, systems for the distribution of used water or sanitary sewers, electrical systems, secondary distribution of electrical systems.

And other information that depended on each individual project.

* * *

[22]

Q Maybe I didn't communicate the question properly.

Is it sometimes the case that if you have a set of construction drawings for urbanization works, that somewhere in the plans will be an index to the drawings?

A You mean an index page?

Q Yes.

A It's normal that in the first page, normally, that would be included.

Q And that would tell you what the subsequent pages were supposed to reflect?

A That's correct.

— There's another name that is used, which is S.I. for site improvement, and when that name is used, normally there is no index or schedule page.

Q Now, yesterday in our discussions with Mr. Gautier, he also testified as to something which he referred to as "anteproyectos," in the context of plans.

Does that term have meaning for you?

A Yes.

Q What would you understand plans related to anteproyectos to include?

A Title page, location page — plan location page.

[23]

site plan, architectural —

THE WITNESS: Architectural distribution.

MR. MANGUAL: Okay, architectural distribution, gracias.

- A Facades, transversal and longitudinal cross-sections of the structures.

Those are the minimal — minimum requirements of an anteproyecto, in terms of plans.

BY MR. RICHICHI:

- Q Is there an English translation of the term "anteproyecto," or is that something that's better spoken of in Spanish?

- A No, it's our — in extensive terms, consultation concerning conformity with the zoning regulations. That's an anteproyecto.

MR. MANGUAL: Consultation concerning conformity.

BY MR. RICHICHI:

- Q And one of the roles of ARPE is assessing conformity with zoning regulations, is that correct?

- A It is to review those anteproyectos to make sure that they comply with the prevailing regulations — zoning regulations of lots in force.

* * *

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* * *

- Q So, in the normal procedures under which ARPE was operating, there would be a constant communication between the engineers at ARPE reviewing the construction plans for urbanization works and the consultant who was working for the proponent.

Is that a fair summary?

- A It's normal, it's the usual way. The consultant is always concerned with making sure that the case moves along.

- Q What — in terms of the communications coming from ARPE to the consultant, what would the nature of those communications be?

- A What are we referring to?

- Q Well, you mentioned that there would be, in the

[31]

normal instance, communication — constant communication —

- A In any case?

- Q In the normal case.

- A The technician informs the progress of the review, the deficiencies which were found, requests for additional information, that is, at that stage or that period of time in regards to construction plans — plans for urbanization projects.

And that continued to be so until 1984.

- Q Okay, I have three things down that you mentioned.

The ARPE engineer may request additional information, may advise the consultant of deficiencies, and inform the consultant of the progress of review, is that correct?

- A That's correct.

- Q All of those things suggest to me that the engineer for ARPE would first have to review the drawings.

Is that a fair assumption?

- A In order to request and review — request information and review, the preliminary review of the plans has to be made — of the project has to be made. Preliminary evaluation.

- Q Now if, in the usual case, if there was a

[32]

deficiency noted in the construction plans for urbanization works, would the consultant be given an opportunity to address that deficiency?

A Yes. Usually yes.

Q Okay. And this would be part of the communication that would go back and forth between the agency and the consultant?

A Yes. Usually that was part of the verbal communication at that time.

Q Was it normally the case that there could be both verbal and written communication?

A There may have been in urbanization projects more formal comments were made when they were extensive, or they were substantial.

Q So, in that instance, if there were extensive or substantial deficiencies which needed to be addressed, it's likely the case that it would be written.

Is that what you're saying?

A That was my understanding, because at that time I didn't deal directly with that —

Q And there would be — was it the — let's again take the normal case, would it be the normal procedure for there to be perhaps a series of exchanges between the consultant and the ARPE

[33]

technician, until the plans were in a state that they could be approved?

A That's what would normally occur.

Q And during this exchange of communications, the consultant would be given an opportunity to modify

or correct the deficiency if it had been noted, is that correct?

A Correct.

• • •

Q And do you know if it was normal to give advance approval for grading operations while the final construction drawings were being prepared?

A If the proponent requested that the land movement aspect be approved, and if that included the entire project, it was possible to evaluate it. And if it met the requirements, that phase could be approved.

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Q Would it be reasonable to anticipate, back in 1982, on the part of the proponent, that he would not have to wait years to hear back from ARPE as to

[37]

deficiencies?

A As I stated before, the usual practice was for the consultant to be visiting the office immediately to find out about a case.

Q Are you saying you don't know the answer to my question?

A That was my answer to the question.

• • •

Q After you came to ARPE, when, if at all, did you come to have any involvement with that project?

A In 1986.

Q Do you recall approximately when that was in 1986?

[38]

A Towards the beginning of the year.

Q Will you explain for me the circumstances under which you came to become involved in that project?

A A letter was referred to my office, from the firm of Basora & Rodriguez, requesting information concerning the status of their case.

Q And that's the first time you became involved in the Vacia Talega project in an official capacity?

A That's correct.

Q Who referred the letter to you?

A The Administrator.

Q And his name was?

A Lionel Motta.

Q Is Motta still with ARPE?

A No, he retired.

Q Okay. Do you recall when that was?

A That he retired?

Q Yes. What was the date?

A February of 1987.

Q Did you work with Mr. Motta on a regular basis after 1985 and up until February of 1987?

A Yes.

Q Would it be fair to say that you had often seen him more than once a day?

A Yes. Usually.

[39]

Q Because of the level of your responsibilities, did you have to work closely with Mr. Motta?

A That's correct.

Q And at this period, you were reporting directly to him, is that correct?

A That's correct.

Q When you received this letter that had been referred to you by Mr. Motta, what actions did you take?

A It was referred, like the hundreds of letters that I receive, to the technician to obtain the information that was being requested.

Q Do you know to which technician this particular letter was referred?

A Possibly Engineer Jorge Colon or Engineer Ramon Ayala.

Q Why do those two names stick out in your mind?

A Because they were the only two engineers that were working with me at that time. Directly.

Q Okay. Did they have any prior involvement with this project?

A Engineer Jorge Colon intervened in the previous stages of the project, when he was Assistant Administrator in the Technical Review Area.

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Q There's something I didn't touch upon a while ago when we were talking about projects.

Is one of ARPE's functions to determine the positions of the various agencies of the Puerto Rican Government with respect to a project?

A Definitely.

Q Is one of the functions of ARPE to solicit the Governor's office on the status of the project?

A Not to consult, but rather to inform.

As a matter of fact, there were

[41]

monthly reports on outstanding projects which are major projects.

Q Are those summary reports?

A Monthly reports of high impact — or importance — projects are made.

Q In summary form?

A Yes. In summary.

Q How long has that procedure been in place?

A I set it up three years ago.

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Q I understand. Let me clarify the question.

Sometime around 1981, the alternate preliminary development was approved by ARPE for the Vacía Talega project. Subsequent to that, were the agencies who had to be inquired of asked about their views regarding the project?

A The question is, was it necessary to consult the agencies after the approval of the alternate development?

Q Yes, I like your question rather than mine.

A At the stage of the construction plans, it was necessary to submit the approval of the agencies.

* * *

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Q Are you saying you have to get two approvals from the agencies?

A That's correct.

Q That's a normal procedure?

A That's correct.

Q And until ARPE acts on the construction drawings, it's not possible to get the second level of approval, is that correct?

A It's up to the consultant to submit them.

Q Submit what?

A The endorsement of the stages of the construction plans, or endorsements to the stages of the construction plan.

Q Is that under the new system, as opposed to the system before?

[45]

A In the previous system it was the same, it was up to him.

In the new system, it is certified before the agencies, or at the agencies.

Q Okay, let me go back.

Going to this prior system that we were talking about, I thought I had understood you to say that it

- was a level of approval that needed to be obtained from the agencies. There would then be the work which ARPE would do on the construction drawings, and then there would have to be a second level of agency approval based upon the finalization of those construction drawings.

Is that correct?

- A Under the previous stage, the preliminary development was approved with the endorsements — the preliminary endorsements.

Then, in the construction plan stage of urbanization works, the consultant — proponent would submit before ARPE the endorsements corresponding to that stage of the project. That is the approved plans for that stage, for example, the aqueduct works as well as the disposition of sewage approved by Aqueducts, the same thing with the electrical stage, et cetera, et cetera.

[46]

- Q What would normally happen if the agency from which the approval was being sought did not act promptly on the request?
- A Since the agency was not requested — the endorsement was not requested by the agency, and yet by the proponent, it was the responsibility of the proponent to intervene with that situation, or handle that situation.

* * *

I'd like to return to the letter that you said you received in January of '86, and which was referred — you believed was referred to the technicians.

Do you recall whether you heard back from the technicians at ARPE as to what was

[47]

going on with that project?

- A Yes. They informed me they had found some documents, and same, except for some documents, did not present any final action.

- Q This was sometime during the beginning of 1986?

- A That's correct.

- Q Do you recall which technicians reported this information to you?

- A I can't be precise as to whether it was Ayala or Colon, but one of the two.

- Q One of those two.

They said they had found some documents. What documents had they found?

- A Some letters, some schematic drawings, copies of prior documents, and others that may have been there.

- Q Did they indicate where they found these?

- A They were in a file cabinet.

- Q In the regional office?

- A No.

- Q In the central office?

- A Central office.

- Q Did they indicate whose office the file cabinet was in?

- A In the filing area of the Regional Operations.

[48]

* * *

Q So what you did was you instructed them to follow up on the letter and they went and found some documents, is that correct?

A That's correct.

Q That was just common sense on your part?

A That's correct.

Q And the reason you did that was to find out about the status of the matters that Mr. Rodriguez had raised?

A That's correct.

Q Okay. The documents that you indicated were letters, schematic drawings, and other documents, were there any — maybe I don't understand what you mean by schematic drawings.

What would schematic drawings include?

A Schematic plans that were there.

Q I guess — bear with me, because I'm an attorney and we're not skilled in the terminology of engineers.

[49]

A schematic refers to what?

A Schematic plans are when they don't specify anything definite in proportion and scale — to scale.

Q Did they indicate whether they had found any project plans?

A No, that's the information they gave me.

Q Did you inquire of them whether they had found any project plans?

A They told me that that was the information they were able to find.

Q Did you inquire about whether they had found any construction drawings?

A No.

Q Why is that?

A Because the instructions that I gave them were to find out what the status of the case was.

Q Are you saying that whether or not ARPE had construction drawings associated with this case was not important as to its status?

A It was important, but it was up to the technician that saw the case to determine what was in that file, or in that case.

Q After they reported this information back to you, what did — what steps did you then take?

[50]

A Subsequently, I informed — I verbally informed the Administrator that we had found some plans and some data, letters, concerning the communication that had been referred to me, and that we understood — because of the importance we understood the project to have to discuss it further down, further along.

Q Okay, I may have missed something there.

You said you verbally informed the Administrator that you had found some plans. What plans were those?

A The schematic plans. Or schematic drawings.

Q Schematic plans are not construction drawings, are they?

A No.

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[51]

Q So, after you gave your report to the Administrator, you don't have any recollection of what his response was?

A It was verbal. It was a verbal report.

Q You don't recall. Okay.

A I verbally informed the Administrator, and he said that we would discuss it later on.

Q Did you discuss it later?

A It was discussed subsequently, briefly or lightly, to determine the course of action to be taken in the case.

Q Who was present during that discussion?

A The Administrator and I, I think Jorge Colon was there, and maybe Ramon Ayala may have been there.

Q And yourself?

A And myself.

Q And what was determined would be done?

A That the original file of the case was going to be looked for, and a brief history made of what had transpired in the case since its beginning in the Planning Board.

Q And what do you mean by the original file? How does that differ from the file that was in the central office?

A Because the cases that are handled in the Technical

[52]

Review Area are sent to the central archives of the agency. And the cases that are handled in the Operations Area are kept in the filing area for the Operations Area.

Therefore, the main file of the project was in the central archives of the agency, on the tenth floor.

Q Okay.

Did you agree with his plan of action?

A Yes. Yes, I was in agreement.

Q Did it seem to be a responsible thing to do, to look for the original file?

A Naturally.

Q It also seemed as though it was common sense, is that correct?

A Of course.

Q Was this brief history generated?

A Something very brief, a draft.

Q Do you recall who put that together?

A Ramon Ayala.

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Q Are you saying it was given to Mr. Ayala?

A Yes. To prepare the history, it was necessary to have the file.

Q Would this type of file include the — any drawings that had been submitted in the case?

A If it existed, it was there. It would have been there.

Q If what existed?

A The plans that you pointed out.

[54]

Q All right. It's not possible that the plans could be somewhere else?

A Plans are kept with the files. Otherwise it would be impossible to deal, or handle — or deal with the matter.

* * *

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* * *

After Mr. Ayala prepared his summary, or history, what steps were taken with respect to the project?

A At some time, the case was discussed with the Administrator, was presented to him, for the determination of steps to follow or steps to be taken.

Q Okay. Now, who presented that to the Administrator?

A The group.

Q Would that group have included yourself, Mr. Ayala, and Mr. Colon?

A That's correct.

* * *

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* * *

Q I should explain. The details will be important, because when we speak to Mr. Ayala and Mr. Colon we

may want to refresh their recollection as to where the meetings occurred.

So this was a meeting approximately two weeks after you received the letter. And it was in Mr. Motta's office. Okay.

And what was decided would be done?

A It was determined that, since the project had been pending for so long after the approval of the Board, a number of years had gone by in which the agency might have some other attitude towards the project, or new requirements, or that new laws or regulations may be applicable to it.

We wanted to be sure. And it was

[58]

determined that it was appropriate to have a meeting among the agencies, presenting the facts of the case to them, or the situation of the case, and try to obtain their feelings or their positions in regards to the project. So that the agency would have a more complete information in that regard.

To that effect, the letter was prepared, inviting those agencies which had to do with the project to assist at a meeting, and we sent them with the letter a copy of the resolution which approved the preliminary development — alternate preliminary development — so that they would have an idea what we were talking about.

Q You indicated that you wanted to have this meeting with the agencies in view of new requirements or new laws which may have come into effect?

A Yes.

Q By that, do you mean new laws and new requirements relating to those agencies?

A Which may have been approved since the original approval of the case.

Q When was the original approval of the case?

A Many years had gone by since the approval of the Board.

Q These new requirements or new laws that you were
[59]

concerned about, did any of them relate to ARPE's functions?

A What happens is that the approval of any project requires the endorsement of the agencies, and therefore it could be affected by it.

* * *

Q Perhaps you can help me in understanding how the agency generally works.

At that time, Mr. Motta was the Administrator of ARPE. If there was any disagreement as to ARPE policy or procedure within the agency, would he be the person who would make the final decision as to what, in fact, policy and procedure would be?

A It's his responsibility.

These things are normally discussed in a group and a consensus is taken.

Q If there's any disagreement, the final decision

[60]

would be made by the Administrator, though. Is that correct?

A He has the authority for it.

* * *

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* * *

Q And the purpose of the meeting was to get as much information as possible about the project?

A Yes.

Q You wanted as much information as possible so you could make the correct decision about the project. Is that right?

A To get additional information, to have more facts.

* * *

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Q I guess my question was, in view of Mr. Rodriguez' letter inquiring about the status of the construction plans, one important aspect of your meeting with your superior and Mr. Colon and Mr. Ayala would have been the status of those plans.

Is that correct?

A That's why I report that the plans had had no action taken upon them, or there had been no action on the plans.

At least, that's what appeared from the file.

Q Did that strike you as unusual?

A It being such a big case, it seemed unusual that the proponent had not prepared anything in the

[72]

preceding four years — or in the past four years, or in the previous four years.

* * *

[73]

Q How would you characterize the plans that were filed?

A They were schematic plans directed towards the structures — or related to the structures.

Q Anteproyecto structures?

A Directed in that direction — or aimed in that direction.

* * *

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Q Directing your attention to the first paragraph of the letter, it appears on the face of the letter, does it not, that Mr. Rodriguez is indicating that he is submitting five sets of copies of construction plans for Block No. 2 of the Vacia Talega project?

A That's what the letter says.

Q And if I could now direct your attention to the second paragraph of the letter, it indicates, does it not, that at the same time Basora & Rodriguez is submitting anteproyectos for buildings to be constructed in connection with that block?

A Yes. That's what it says.

Q Do you know Mr. Rodriguez?

A Yes, I know him.

Q Have you worked with him professionally?

A Never.

Q Do you know whether he has a reputation as an engineer?

A He has a good reputation as an engineer.

* * *

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Q Have you ever had any discussions with Mr.

[95]

Rodriguez regarding his view of this particular project?

A Subsequent to this date in 1988, there were meetings.

Q At those meetings, he expressed his viewpoints regarding this project?

A The points were discussed, but the actions taken were consensus actions.

* * *

[96]

* * *

Q Okay. Did you ever have any discussions regarding Vacia Talega which just involved you and Mr. Rodriguez?

[97]

A No, none.

Q Did Mr. Rodriguez, subsequent to 1986, become Administrator of ARPE?

A Once Engineer Motta stopped — ceased his duties, as established by the organic law of the agency, the Deputy Administrator became the Administrator, and in this case it was Rene Rodriguez.

* * *

* * *

Q Is it fair to say that during the course of your work during the day, you may have many papers on your desk?

A Hundreds.

Q Hundreds. You're like me.

The offices are not locked during the day, I take it?

A No. At night they're closed with keys; the main access to the hallways, and my office as well.

Q And is it fair to say that throughout the day you may be away from your desk?

A Yes.

Q That's just the way offices work, correct?

When you're away from your desk, there's nothing to prevent someone else who works on that floor from coming into your office?

A No, I have two secretaries in front that do not allow access.

Q But if Mr. Motta wanted to, when he was Administrator — walked into your office, would they stop him?

A Well, that's different, because he's the Director.

Q So, the Director has access to any office?

A Of course. In fact, he has a master key to all the

floors.

Q So, even if your office was locked at night, he can get in?

A Of course.

* * *

* * *

Q The construction of the regional treatment plant, did that raise any concerns in ARPE's mind about the approval of the Vacia Talega project?

A I don't know, because I didn't intervene in that phase of the project, or that stage of the project.

Q Okay. I think there may have been a miscommunication.

I read the letter as saying that the conditions of the Planning Board's approval have not varied substantially, but there is mention of two changes that have occurred.

A That's correct.

Q In the view of ARPE at the time, did those changes affect the validity of the approval?

A Not at all.

Q Would it be fair to say that it made the conditions for the approval of the project more favorable?

A From an engineering point of view, that's correct.

* * *

* * *

Q My question is, how many other meetings are you aware of that have occurred at ARPE where this many agency heads have been present?

A None, aside from this.

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[114]

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Q What future actions by the Planning Board and Natural Resources Department are you referring to?

A From the letter itself of April 10th, 1986, Exhibit CM-6, it states that the Board is carrying out a study for the management plan of the special planning area for the Pinones area, which obviously — in which obviously this project had an effect, or is affected.

Q But as of the date of that letter, the policy for land use with respect to this project had already been determined, is that correct?

A That's correct.

Q And there was no indication that that policy with respect to land use had changed?

A That's correct. It says it's under study.

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[115]

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Q If I can just clarify one thing.

The April 10th letter to which you referred, not to mince words with you, but it says that the Planning Board is requesting funds for the study, is that correct?

A Yes, that's correct.

Q It doesn't actually say there is a study ongoing, is that correct?

A They had something preliminary laid out, or planned.

Q Have you seen that?

A There were schematics, as there are in many areas of Puerto Rico. But it's not a formal study.

Q Okay. Are you talking about currently or back then?

A After about two or three years.

* * *

[117]

Q Mr. Rivera Cabrera was the individual to whom Mr. Motta reported in the Governor's office?

A It is the special aide to the Governor through whom normally all information to Fortaleza is channeled through, or through whom information is channeled to Fortaleza.

Q Okay. So Mr. — let me take that back.

The Administrator's contact at the Governor's office would have been Mr. Rivera Cabrera?

A That's correct.

Q And Mr. Rivera Cabrera reported directly to the Governor?

A Correct.

Q During the time when you — well, during the time that you have worked at ARPE, did you see many letters which report from the Administrator to the Governor's aide about particular projects.

A Si.

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[119]

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Q Based on that portion of the letter, what did you understand the purpose of the meeting to be?

A To see what was the position of the agencies at that moment, as far as that the agencies have an opportunity to become — become more familiar or more amply informed with the project by the presentation made by the proponent, and after that representation — or that presentation, to have an opportunity to have an open discussion about that project, and try to reach some agreements.

[120]

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Q I believe you had indicated earlier that it was the responsibility of the proponent of a project to get endorsements from the agencies, is that correct?

A That's correct.

Q Why, in this instance, was ARPE calling together all of the heads of the agencies for a meeting?

A Because it understood there were some special circumstances, because of the size of the project and the characteristics surrounding it.

And specifically because of the length of time the project had been pending without being resolved, or solved.

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[125]

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Q And you were requested to have this prepared by Mr. Rodriguez?

A Yes, he asked me to prepare a summary of the events that had transpired. As well as the communications from the agency.

Q In that respect, this was similar to what had

[126]

occurred with Mr. Motta two years before, is that correct?

A That's correct.

Q Did Mr. Rodriguez indicated why he wanted you to prepare this memorandum — or, I'm sorry, to have it prepared?

A I understand that it occurred once there is a complaint filed by PFZ in the courts, to have the information available.

Q So, a lawsuit had been filed prior to this memorandum being prepared. That was your understanding?

A Yes, we knew that fact.

Q Was it also known that Mr. Rodriguez was named as a defendant in the case?

A We knew that fact.

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[131]

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Based on this memorandum, it appears, does it not, that the views of the agencies had been obtained as of October 17th, 1986?

A Yes. That's correct.

Q And I believe you indicated that it was the intent or the consensus of ARPE at the time that those views would at some point be communicated to the proponent, is that correct?

A No. They would be discussed in the agency, and the official position of the agency was going to be taken. Which would be notified to the parties.

[132]

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In these responses which ARPE

[133]

received, were there any responses which you believed would have prevented the project from being approved?

THE WITNESS: Maybe number 7. Y numero tres.

BY MR. RICHICHI:

Q Number 7 —

MS. ROJAS: Just a second.

The last part, he said it in Spanish. It hasn't been translated.

MR. MANGUAL: Okay, I'm sorry.

MS. ROJAS: Because he said number 7 in English, and then he said —

MR. MANGUAL: Okay. Number 7, and perhaps number 3. Number 7 and number 3.

BY MR. RICHICHI:

Q Number 7 is the comments of the Environmental Quality Board?

A Yes.

Q Subsequent to those comments, the Planning Board reaffirmed its approval, didn't it?

A That's correct.

Q And specifically addressed the environmental concerns, is that correct?

A That's correct.

[134]

Q Did you believe it was ARPE's role to disapprove a project on environmental grounds for which the Planning Board had expressed approval?

A Not as such. Because the Environmental Quality Board understood that the environmental phase had been — had not been completed; and should have been completed with a supplement to the DIA.

And therefore this reopened the case anew, and they had to recirculate it again among all the agencies involved.

Q The entry you have with respect to the Planning Board indicates the Planning Board found that the environmental process in the original approval of the consultation on location was completed.

Do you see where I'm at?

A Yes, I understand.

Q Where you see —

A But there was a strong discussion in that regard.

Q Was it the view of ARPE that it could overrule the Planning Board on that?

A ARPE is looking for a consensus and it wants to mediate in the controversy.

Q Did you think — did you personally think that ARPE had the authority to overrule the Planning Board?

A We're not speaking of that.

[135]

Q I am. Did you?

A No, definitely not.

Q Did Mr. Motta feel that way?

A I understand so.

Q Who would have the final determination on environmental matters? The Environmental Quality Board, ARPE, the Planning Board?

A That's an interesting and extensive question.

I can go into it at length.

THE WITNESS: Briefly.

MR. MANGUAL: All right, briefly.

MS. ROJAS: In a nutshell.

A The originating agency of a project can be the Planning Board or ARPE, or some other governmental agency. The environmental process is originated — begun in the originating agency, and same consists of several stages. It can be just a simple environmental form, an environmental evaluation, or a declaration of environmental impact.

Each agency has the opportunity of commenting in regards to that document, and the agency that

finally accepts the environmental document is the Environmental Quality Board.

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[140]

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Q Okay. The letter indicates — or the memo indicates that there was a recommendation that a communication be prepared.

Is it fair to say that as of February of '87 you needed no more information from the agencies in order to prepare the communication?

A The agencies had already expressed themselves in general terms.

Q Well, was a communication ever prepared?

A Not that I can recall.

Q Okay. Let me — I want to make sure we understand each other.

I'm not asking if a communication was ever sent. I want to know if a communication was ever prepared.

Q The communication in that sense, in those terms, was never sent. It doesn't appear from the files.

Q Okay. I understand it does not appear from the files.

Was a draft communication ever prepared?

[141]

A There may have been a draft that never went out.

Q Who would have prepared that?

A The same technicians that have always dealt with the case.

- Q That would be either Mr. Ayala or Mr. Colon?
- A That's correct.
- Q Okay. And would such a draft have been reviewed by you?
- A That's correct.
- Q Would Rene Rodriguez have reviewed such a draft?
- A I don't know.
- Q Okay. Do you recall having seen such a draft communication?
- A It's possible. I see dozens of drafts of communications daily.

That's why we always turn to the file, because if it was issued, it's in the file. And it's not official until it's signed and leaves.

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[150]

* * *

- Q Between February of — well, do you recall when Mr. Rodriguez officially became the acting Administrator?
- A The next day after Motta ceased in his functions, which was the last week in February.
- Q From February until January 21st of 1988, did the Administrator of ARPE order any action to be taken on the Vacía Talega project?
- A I don't recall that he had taken any action.
- Q And you're not aware of any action that he requested be taken with respect to the consensus that was reached in that meeting?

- A I don't recall any instruction in that regard.

* * *

- Q During this period in 1987, Mr.

[151]

Rodriguez would have been your supervisor, is that correct?

- A That's correct.
- Q Did he ever call you in to indicate that there should be follow-up action on this project?
- A I don't recall him having said so.
- Q Do you recall anything else that he said about the project during that period?
- A I don't recall.
- Q Do you know whether there was discussion in the news media about this case during that period?
- A I don't recall having seen anything in the newspaper, and if I did I've forgotten.
- Q Was it your impression that this was a politically controversial project?
- A As it appears from the file, there is no evidence to that effect.
- Q Did Mr. Rodriguez ever indicate that this was a politically sensitive case to you?
- A I don't recall him having said that to me.

* * *

[152]

* * *

- Q And having received the complaint against him, he directed you to have that memorandum prepared?

A A couple of weeks later.

Q So, he took no action that you were aware of from the time of the February meeting until the time of the complaint?

A I don't recall, and from the file, no — there doesn't seem to have been any action.

Q But once he was named as a defendant in the case, he began giving you instructions with respect to the case?

A He requested this report, and I delivered it to him.

[153]

Q After Mr. Rodriguez — well, I'll withdraw that.

After Mr. Rodriguez became the Administrator of ARPE, the consensus with respect to the Vacia Talega project changed?

A There had been no discussions concerning the project until 1988.

Q Let me back up here.

In 1987, in Mr. Motta's office, there was a consensus reached that there should be a communication?

A That's correct.

Q Mr. Rodriguez becomes the ARPE Administrator.

Did that consensus now change?

A The consensus had not changed until subsequent meetings in which new elements, or different elements, were presented.

Q During that period, ARPE was just inactive on this project?

A That's correct.

Q Did the proponent make inquiries about the project?

A I don't recall there being any letter requesting any information.

I do know that in November of '87 they took some plans to the Area of Technical Review.

[154]

Q Anteproyectos for buildings?

A Yes, anteproyectos for buildings.

Q And those were —

A That's the first document that they submit since 1982.

* * *

[156]

* * *

Q There was a meeting in July of

[157]

1988 regarding the Vacia Talega project, was there not?

A That's correct.

Q Who was present for that meeting?

A Pedro Juan Sanchez, may he rest in peace.

(Whereupon there was an exchange in Spanish concerning the translation.)

MR. MANGUAL: "That I can recall."

I'm sorry, I just killed somebody!

(Whereupon there was an off-the-record discussion.)

BY MR. RICHICHI:

Q So far we have Pedro —

A Colon or Ayala, one of the two. Attorney Chiquez. I was there.

I don't think there was anyone else. I'm not too sure.

That was a preliminary meeting.

Q A preliminary meeting?

A Yes, because that group meets and then it discusses it with the Administrator.

Q So there was a second meeting?

A Second meeting?

[158]

Maybe later the same day.

Q And Rene Rodriguez was at that meeting?

A Yes, in the second when the consensus on the case was reached.

Q The consensus was reached at the second meeting?

A That's correct. Some recommendations were taken, and it was agreed that that would be action to take.

* * *

[160]

Q Is it reasonable to assume that before the first meeting in July that Mr. Sanchez would have met with Mr. Rodriguez?

A He may have met with him.

Q When you had the second meeting in Mr. Rodriguez' office, did he seem surprised that you all —

A Well, he — once he had indicted that we should meet, we should return to him with a consensus. To discuss it.

Q Was it he who called the meeting?

A Well, he ordered us to meet.

Q So he ordered you to meet.

A Yes. He told us, "Make a meeting and discuss this topic."

Q And the topic was Vacia Talega?

A That's correct.

Q Did he provide any other instructions?

A No, none. Just to review the documents carefully.

Q Was that done?

A That's correct.

Q Were there drawings that were reviewed during the meeting?

A At that time the drawings were reviewed.

Q Which drawings?

A The ones that were in the documents.

[161]

Q Do you recall anything about the documents that were reviewed?

A The plans that were there were reviewed. They were reviewed against — all of them were reviewed against regulation — Planning Board Regulation No. 3 and against Regulation P-139 of the Board, to determine if it met with the requirements set out in the Building Code.

THE WITNESS: Not Building Code.

MR. MANGUAL: In that code.

* * *

Q Were there any construction

[162]

drawings for urbanization works which were in that file?

A There were some schematic drawings which we — which all of us reviewed simultaneously against the quoted regulations or cited regulations.

And we understood that they did not comply with the provisions or the requirements of the code. And that was the consensus.

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[166]

Q The response to the proponent's request was prepared and sent to him, denying the reconsideration, is that correct?

A I understand that to be so.

I didn't intervene in that letter. I was on vacation, for the first time in

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Q Prior to the date of this deposition, had you seen that document before?

A Never.

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Q How long did the meeting last?

A Several hours.

Q Were the items of correspondence discussed in detail?

A They were discussed in detail. They were analyzed, legally and technically.

Q Did you participate in the technical analysis?

A I participated in the technical analysis.

Q Was there disagreement between the legal and the technical analysis?

A No, because they're separate fields.

In one we're speaking of what there is in some plans. And the other is the legal requirement of a document, a regulation. To see how this applied to that and how that applied to this.

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[176]

* * *

BY MR. RICHICHI:

Q What occurred during the meeting was that certain drawings —

A Correcto.

Q — that had been submitted by Basora & Rodriguez were evaluated with respect to legal requirements which bore no relation to those documents?

A With which documents? That's the last part of the question I don't understand.

- Q Okay. Let me see if — we'll look at the facts and then we'll see what happened, okay?

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[178]

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Does it appear from these two letters that Mr. Rene Rodriguez in his December 16th letter of 1988 is not referring to the same

[179]

construction plans for urbanization works that Luis Rodriguez referred to in this letter?

- A He was referring to the plans that existed in our file, which were submitted by the firm of Basora & Rodriguez and sealed by them.
- Q Okay. So he was referring to the documents in ARPE's file, is that correct?
- A That's correct.
- Q And those were the documents that were in ARPE's file that was reviewed in the July meeting of 1988?
- A That's correct.
- Q So sheet number 9 of those plans in the July meeting of 1988 was an elevation, was it?
- A That's what it says here.
- Q That's your understanding?
- A That's what I understand that it says here.
- Q Did anyone — oh, I'm sorry, it says there in the December 16th, 1988 letter?
- A I understand that it says in sheet 9, elevation.

- Q During the July 1988 meeting, did anyone bring up the fact that the plans which were being reviewed did not appear consistent with what had been represented in Mr. Luis Rodriguez' letter submitting the plans?

- A No. We reviewed what we had in our files, and the [180]

determination was made on the basis of what we had in our file.

- Q Did anyone suggest that the construction plans which had been submitted were missing from the file?
- A Nobody, because they were there. The plan was there. Sealed and signed by the firm of Basora & Rodriguez.

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[181]

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- Q Directing your attention to Rene Rodriguez' December 16th, 1988 letter.
- A Yes.
- Q He refers to sheet 9 of plans which consist of an elevation, is that correct?
- A That's correct. That's what the letter says.
- Q And your testimony is that these were the plans which were considered in the July meeting, isn't that correct?
- A That's correct. That they're similar to the ones that we saw in July 1988.

Q Well, wouldn't they have to be the same, because you had no other plans?

A There was no other plan in the file. Just what we saw at that moment, which is what this letter is referring to.

Q But these cannot be the same construction plans to which Mr. Rodriguez referred, is that correct?

[182]

A Engineer Rodriguez is referring to the plans that were evaluated in July of 1988.

MS. ROJAS: Which engineer? They're both Engineer Rodriguez.

THE WITNESS: The letter signed by Engineer Rene Rodriguez.

BY MR. RICHICHI:

Q Can we agree that there was an inconsistency between those plans and what is represented in Mr. Luis Rodriguez' letter of February 22nd, 1982?

A There may be, because that occurs frequently, with documents submitted which are supposed to be there and are not. That's frequent.

Q Do you believe that's what happened in this case?

A It may be.

In an office where hundreds of sheets are processed, one sheet may have gone through that wasn't.

Q What really occurred is during the July meeting you were looking at the wrong plans?

A No. We saw the plans that were in the file. The only ones.

Q But they were not the plans that Mr. Rodriguez — Luis Rodriguez had asked you to consider, were they?

[183]

A Well, those were the plans that were in the file, because when the other plans were returned to him, he pointed out — or didn't point out anything in that regard, and therefore he understood that the plans were returned to him were the correct ones.

He made no comment whatsoever, and nor did he establish any claim or present any claim.

Q Returned to him when?

A By way of Exhibit No. 3, mentioned in Exhibit No. 3.

Q The anteproyectos for building structures were returned to him, were they not?

A That's correct.

Q But those were not the construction drawings for urbanization works which he submitted and asked consideration of, were they?

A The plans that were returned were those of an anteproyecto, and therefore what is left are the plans for urbanization works as so titled by him.

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[186]

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Q Have you had an opportunity to review that exhibit?

A Yes.

Q Does your signature appear at the bottom?

A Yes, that's my signature.

Q You were the author of this letter?

A Yes.

Q And were you assisted in writing this letter?

A Yes, it was checked by the Legal Office.

[187]

Q Were you directed to write this letter?

A That was the agreement, the consensus. Because the case was in the Regional Operations Area.

* * *

Q So this document may have reflected the view of the majority, but not necessarily your view, is that correct?

A I repeat, that was the agreement of the group, and

[188]

I stand by the agreement.

Q But before the vote of the group was taken, you held a different view, is that correct?

A Years back.

Q The consensus of the group was that you would write this letter?

A The consensus of the group was to determine the action to be taken. It was instructed that the letter be written by the Administrator in the two corresponding areas, Engineer Virgilio Gautier and myself.

* * *

[192]

Q In your letter of August 2nd, 1988, you say that one copy of the documents had still been kept in your files, is that correct?

A Where does it say that?

Q Do you see your signature?

A Yes.

Q Look in the paragraph above that.

A We're saying that the copy of the documents which we still have in our file is being returned, the copy that was evaluated.

Q So the one copy is being returned?

A The only one that was in the file. There was nothing else, to my best understanding.

Q Well, if these are the construction drawings which Mr. Rodriguez submitted —

A Eso es correcto.

Q — as you contend, if the documents to which you refer in your August 2nd letter are the construction drawings to which Mr. Rodriguez referred in his 1982 letter —

A Are the construction plans so-called by Engineer Rodriguez.

Q Where did the other four sets of construction plans go?

A I don't know. —

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[197]

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Q At the meeting in July of '88, did anyone suggest that there may be some files missing?

A It was commented, but an intensive search had been made and that was all there was.

* * *

Q Okay. But you do remember that someone suggested

[198]

the plans might be missing?

A Somebody commented during the meeting.

Q Was it you?

A No, it wasn't me.

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Q And when Mr. Rodriguez showed up, he led the discussion, is that correct?

A That's correct.

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[199]

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Q Misplaced, okay.

And the construction drawings in this case may have been misplaced, is that correct?

A All the documents in the agency are capable of being misplaced, or have the possibility of being misplaced, because they are not fixed in a computer system.

Q If a document is misplaced, that doesn't mean that it fails to exist, does it?

A It is alive, but hidden.

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[201]

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Q This is an August 17th, 1988 letter from Luis Rodriguez of Basora & Rodriguez to you, is it not?

A Yes.

Q In the second paragraph of the letter, he advises you that you've looked at the wrong drawings, doesn't he?

A That's what he says.

Q As you sit here today, do you think he's right?

A I don't think he's right.

Q You believe as you sit here today that the preliminary project plans which you reviewed in July of 1988 were the construction drawings for

[202]

urbanization works which Mr. Rodriguez submitted in 1982?

A They were the so-called construction plans, so denominated by the firm of Basora & Rodriguez. That's what we reviewed in July of 1988.

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[205]

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Q You said an intensive search was made of the files.

A That's correct.

Q And this was at the request of Pedro Juan Sanchez?

A Yes, it was. And it was done.

Q I don't believe I had an answer to my question before.

Why was the search conducted?

- A In the possibility that one may exist, and to make sure that what we were evaluating was what existed.

* * *

[212]

- Q Did you have to be convinced to join the consensus of the group?
- A We went item by item, each detail was amply discussed, and as each detail was discussed doubts were being dispelled, and a conclusion was reached.
- Q Okay, so there were a number of points where there were doubts, is that correct?
- A Of course.
- Q Some of the doubts were doubts that you had raised, is that correct?
- A Yes, that's correct.
- Q And some of the doubts were doubts that Mr. Colon had raised, is that correct?
- A That's possible.

[213]

- Q And he was most familiar with the construction drawings, is that correct?
- A That's correct.
- Q And you had doubts in view of the meetings that had occurred in 1986, is that correct?
- A Yes, that's correct, in the beginning.
- Q And you were convinced otherwise?
- A That's correct.

- Q So you held some views at the beginning of the meeting which you did not hold at the end of the meeting, is that correct?
- A That's correct.
- Q And you were convinced to change your views from the beginning of the meeting to the end?
- A That's correct.
- Q And other individuals at the meeting were convinced to change the views that they had at the beginning?
- A That's possible.
- Q Don't you recall that occurred?
- A I recall as far as I'm concerned.

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[214]

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- Q What was the view of the group as to all the — as to the meeting that had been held in September of 1986 to which all the agencies had been invited to comment on the project?
- A Never had the plans had such a broad review as they had at that moment. Because independently of it, of being or not being, the project being in effect, the action by the project engineer, the performance, had to be under the certifications law. Therefore he had to adjust himself to certain requirements at the moment of certification.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.	}	CIVIL NO. 87-01915 (HL)
Plaintiff,		
vs.		
RENE ALBERTO RODRIGUEZ, et al.		
Defendants.		

EXCERPTS FROM THE DEPOSITION OF RENE
ALBERTO RODRIGUEZ (JUNE 16, 1989)

[11]

* * *

Q Okay. Can you describe for me the circumstances under which you left the Planning Board and became associated with ARPE?

A What happened is that until 1975 ARPE was a division or dependency of the Planning Board. And by way of Law 76 of 1974 — I'm not sure of the year — then they take away from the Planning Board all that which consisted of the operational phase of the Planning Board and they converted it into an agency called ARPE, and all the people that were there automatically were transferred to ARPE.

Q When you became associated with ARPE were you also director of the division with which you'd been associated with at the Planning Board?

A Yes. But let me mention a detail that I left out. Prior to going to ARPE, I think towards '73 or '74, I

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[13]

Q Okay. You mentioned that the division which you were working with worked with construction plans for urbanization works, is that correct?

A Yes.

Q Okay, and are you familiar with that general term, "construction plans for urbanization works"?

A Yes.

Q Is that a term that's often used within ARPE?

A Construction plans?

Q Yes.

A Yes.

Q And could you explain for me generally what you understand construction plans for urbanization works to include?

A Construction plans are plans which include lot distribution, street patterns, the electrical distribution, water distribution, sanitary facilities.

But besides that, it includes cost estimates, technical specifications in general terms. The detail of that is in Regulation 12.

Q Generally speaking, if I were looking at some construction plans for urbanization works, would you expect them to be large drawings?

A Yes.

[14]

Q Okay. And I take . . .

A That also includes measurement plans and topographic plans.

Q Okay. You've mentioned a lot of plans here. Would a set of construction plans for urbanization works be a number of sheets?

A Yes. That also includes the things that I told you. The cost estimates and the endorsements of the agencies that have a say-so in the matter, or input. That consists of plans which are submitted to them and they are submitted as approved plans to the agency.

Q So if I were looking at construction drawings for urbanization works there would be a number of large drawings, among other things, is that right?

A Yes.

Q With respect to the drawings, is it sometimes the case that whoever prepared the drawings will include an index of the various sheets?

A Yes. I understand so.

Q Would construction plans for urbanization works include drawings of buildings?

A No, not for urbanization.

Q So if I were looking at some drawings of buildings, I would be able to determine that those were not

[15]

construction drawings for urbanization works?

A Well, the thing is that construction plans for buildings, for structures, are submitted separately.

Q So it's easy to distinguish drawings for buildings from construction drawings for urbanization works?

A Yes, because when they're for structures you notice the structures in the different floors, details of the building,

electrical plans, plumbing plans, mechanical plans, outly of air conditionings — everything that is involved in it.

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Q Can you explain for me what you understand "anteproyecto" to be?

A It's a preliminary stage prior to the construction plan which is submitted to the agency when the engineer or architect makes the plan and has knowledge that he is not meeting the requirements of the regulations fully and he requests that variations be approved. Variations means deviations from the regulations. And once that is approved a resolution is made up, a series of facts are laid out, and when he submits the construction plan he should

[17]

comply with everything that's indicated there.

Q Would it ever be the case that you would submit anteproyecto even if you're not seeking a deviation from the regulations?

A That could be. It's up to the proponent, the general norm is that it's not done. I would say that ninety-nine percent of them do not do so.

Q I see. Would that be done depending upon the complexity of the project?

A Yes, it could be because maybe the professional has a doubt as to whether he's complying or not with the regulations and to avoid setbacks or difficulties when he suybmits the construction plan, he submits it for evaluation.

Q Okay, so you're saying that it would be more likely that anteproyecto might be submitted in connection with the complex project than a less complex project?

A That could be, but it need not be so. I could have a very simple project with no complications but if I don't comply with the regulations, the architect and engineers know that they can't submit a construction plan if they don't request some variations.

Q But it's an acceptable procedure in ARPE's view to submit anteproyecto for a complex project?

A I understand that when they submit it is

[18]

because they do not comply with the regulations. Because if I comply with the regulations, I just submit the construction plans and I avoid a step that could cost me several months in the agency.

Q But as a matter of practice ARPE would accept such anteproyecto on a complex project?

A I understand that they only submit it when they don't comply.

Q Are such plans ever accepted for submission?

A If the person has a prior stage and they can be reviewed, they can be accepted. But that is different from when I have a previous stage in the process with the agency. The general norm is that they not be accepted until that stage is completed because there are cases where I have an anteproyecto and if, for example, I have a lot here and I want to make just a building which does not contemplate urbanization works, just a building and a parking lot, for example that building there, in that building I submitted a series of anteproyecto — the building submitted a series of deviations or variations. Then it was approved. And later a construction plan was approved.

But when I have a development and with an anteproyecto, the general norm is that they did not accept it until the prior stage of construction plans are completed.

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Q So if I understand you right, what you're suggesting is that construction plans for urbanization works would have to be reviewed and completed before you might accept the anteproyecto?

A That's the general norm.

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Q If — assuming we have construction drawings for urbanization works and anteproyecto for buildings, would you anticipate that any ARPE engineer would be able to distinguish between the two?

A No. Let me explain.

For example, if I have an engineer who just dedicates himself to dealing with complaints or simple subdivisions who has never seen an anteproyecto or a final construction plan, well possibly that individual may not be able to distinguish.

Q I see. Well if an engineer who worked on a regular basis with construction plans for urbanization works were shown such plans and some anteproyecto, do you believe he should be able to distinguish between them easily?

A He could be able to distinguish it.

Q Would it be easy to distinguish between the two?

A For whoever knows it, yes.

Q And do you believe you could distinguish between the two quite easily?

A I would say yes. Although I personally did not handle that, but from the knowledge that I have and the

[21]

experience in the agency, I personally never intervened in the direct revision of the plan in detail, of neither anteproyectos, construction plans or preliminary development plans.

Q You've mentioned the revision of plans in detail. Is that something which — a function which ARPE performed?

A When the plan is submitted under certifications regulations, the law of certifications, the plan is not reviewed. But when you submit a plan which is not under the certifications law, it has to be reviewed.

As a matter of fact, prior to the existence of the certification law all plans, it was necessary to review them.

We're talking about construction plans now.

Q When you say it was necessary to review them, you mean it was necessary for ARPE to review them?

A Which?

Q Construction plans.

A Yes. When the certifications law did not exist, yes. And in those cases which are not submitted, if I'm an engineer and I'm going to perform an expansion of a house and the estimated cost is less than fifteen thousand — and there are also cases which the regulations permit that

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plans do not have to be certified. In those cases the engineer has the option or the authority to certify or to submit it for review.

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Q Prior to the time when the certification regulations took effect on construction drawings for urbanization works,

did I understand you to say that ARPE would review such plans?

A Yes.

Q Could you describe generally for me how that process would work?

A If you submit a construction plan you have to submit also the location consultation approval, if any, and the approved preliminary development and then all the requirements made by the Planning Board were checked, and by ARPE in the preliminary development. And you would check to make sure it had all the necessary copies, cost estimate, technical specifications, that you would have the signature of the engineers, architects that intervened in the process. You would also check that it had the Internal Revenue stamps and College of Engineering stamps. And then you would check to

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make sure that it complied with the regulations.

Q Once this review was performed, then what steps would be taken?

A If the case had any deficiencies, objections we called them, a letter was sent indicating to him that he should correct the plan or to stop by the office for us to explain to him if he had any doubt.

Q When you said a letter was sent to him, did you mean the consultant for the proponent of the project?

A The proponent represented by his engineer or architect or the firm that represented him.

Q So if there were some objections those would be communicated to the proponent's engineer and he would be allowed to make efforts to address those deficiencies?

A Yes.

Q Let's assume that such — in the ordinary case, some — withdraw that.

Let's just take a normal case involving urbanization, construction drawings for urbanization works. Assume that this set of plans had some objections and it was communicated to the engineer. If he addressed them, what then would happen?

A If the person corrected the deficiencies and complied with everything, it could be approved. Because if

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he did not comply — and not only that, besides that he has to have the approval of the agencies. And if he could comply with what was told to him, but if he couldn't get the endorsement of the agencies, the case remained there.

Q If the consultant attempted to correct any deficiencies that had been noted, ARPE would then review those corrections, is that correct?

A Yes. If he complied, then there was no problem.

Q Okay. If there were still some deficiencies remaining would there be additional communications?

A Yes. There could also be communicating.

Q So there would be a back and forth series of communications until any deficiencies were corrected?

A Yes.

Q In a normal case involving construction plans for urbanization works how long would you expect it would take for ARPE to communicate any deficiencies in the plans to the consultant?

A That all depends on when they find them. There's not a set timetable. Each case is different and one case is more

difficult than another or more complex than another. It depends on the volume of work which is in the agency and the technicians that are reviewing the cases.

Q Would you anticipate that it might take years

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to notify the consultant?

A I don't know. There's no rules. That depends on the complexity of the case. The general norm is that it could take two or three months.

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A With none of them. They would deal directly with the Administrator. And then what happens is when the Administrator has some tasks assigned, sometimes he would delegate those to me or to some other person. Sometimes from Fortaleza and as far as the legislature, they'll send private citizens, or sometimes the legislators themselves will come by.

But the governor's advisors will always deal with the head of the agency unless the head of the agency is not there and they have to consult with one.

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Q Do you believe there was another meeting subsequent to this regarding the Vasia Talega project?

A Yes, I believe there was a second meeting at which Engineer Luis Rodriguez was present.

Q Was that some months later, to your recollection?

A Sometime afterwards. I don't recall the exact date.

Q But you believe you attended both meetings?

A Yes.

Q Do you know if you were asked to take any

[42]

action as a follow-up to the first meeting?

A No. Absolutely not. The only person in charge of the project was Engineer Cruz Marciano Robles. In total and absolute form. He had all responsibility. I was not assigned any responsibility in the case. Just to be familiarized or bring me up to date on the case.

I don't recall, there may have been one of the lawyers, but I don't recall.

Q Do you know what position Mr. Marciano held at the time of that meeting?

A Yes, he was the Assistant Administrator in charge of regional operations.

Q To your knowledge did he become involved in every project?

A Who?

Q Cruz Marciano.

A Those which pertained to his program, but not necessarily in all of them. Because he supervises the regional offices and the regional offices in which they intervene over there directly. But cases under his area where his office is, he has the full responsibility for them.

Q But he was in charge of all regional operations, is that correct?

[43]

A Yes.

Q Was it unusual for a person who was in charge of all regional operations to involve himself in one particular case?

A What happens is that when a case was in his office — there are cases that he has, for example, the construction plans for an urbanization, he intervenes directly. He approves, denies or returns.

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Q Okay. Well, what functions does ARPE perform with respect to agency approvals in connection with a particular project?

A Which agency approvals?

Q Well, let me back up. It's again — in reviewing a project does ARPE concern itself with agency

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approvals for that project?

A What happens is that the part of the responsibility of the regulatory and legal responsibility of ARPE has to comply with other rules and laws in this regard and it has direct relationship with Electric Energy Authority, Acueducts, municipalities, Public Works on occasion, Natural Resources when applicable, and possibly the Planning Board. And then possibly when ARPE — a person submits a construction plan, this construction plan has to be received complete. And then the technician checks each one of the things he checks. If you have the electrical distribution system, and that went to Electric Energy. And Electric Energy approved the plan, then for us, that's an endorsement. It's an approval over there but it's an endorsement for us, for us to make a determination.

Q So ARPE makes some sort of determination as to whether there are agency approvals which they would characterize as endorsements, is that correct?

A Yes. What happens is that the agency will send a plan, will put a stamp on it, a signature, and will send you a letter saying that they approve and it meets with their regulations.

Q Okay. How does ARPE determine which endorsements have to be obtained?

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A That's on a case to case basis. Some plans are in archeological areas and you have to consult the Institute of Culture. When it's in floodable areas or affects bodies of water you have to consult Natural Resources. And if it's affected by roads you have to consult Public Works. It depends on the case.

Q Now, does ARPE ordinarily contact the agencies for the endorsements or does the proponent do that?

A It is a stage which is the preliminary development. When that stage is submitted to ARPE, ARPE itself obtains the endorsements. When it's a final construction plan, the proponent, the engineer or architect has to obtain that endorsement with the complete package of documents and plans and estimates and specifications, technical specifications, et cetera. That's part of the package.

Q If ARPE believes there are additional endorsements that need to be obtained does it communicate that to the . . .

A Yes. Yes, it communicates it.

Q Just for the clarity of the record, I was going to say communicates it to the proponent. Is that . . .

A On many occasions he's told of it verbally because there are many proponents that are in ARPE every day. Although you can send them communications it's more comfortable

[49]

instead of waiting for the secretary to prepare a letter, to shorten the time you notify him personally.

Q If there is a concern that is raised by a particular agency regarding an approval, will ARPE normally communicate that to the proponent?

THE INTERPRETER: I'm sorry, let me have that again.

BY MR. RICHICHI:

Q If there's a concern about an approval that is raised by a particular agency, and communicated to ARPE, will ARPE normally advise the proponent?

A It can do so but the general norm is that when it's in the agency, that same agency that you mentioned will communicate it. Because when it's construction plans he makes the approach to the agency directly. And they'll notify him. It's possible that they may notify ARPE.

Q Does ARPE often call together the heads of the various agencies to solicit their views on particular projects?

A Almost never. Rarely.

Q Do you know why that was done in this particular instance?

A The only one who knows that is Engineer Mota.

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Q And as you understood it, the individuals most familiar with this case were Marcano, Colon and Ayala?

A Ayala and also Pedro Juan Sanchez and Gautier. Gautier knows a lot about the case also.

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Q Do you recall generally what the purpose of that meeting was that the proponent attended and the agency heads attended?

A I think that Engineer Mota made that meeting to clarify doubts that he had and to obtain information to answer the letter and also, as I understand it, he invited the agency heads with the purpose of obtaining more quickly comments from them concerning the case, the project.

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Q In the next to the last paragraph of the letter it mentions a meeting to be held on September 9, 1986. Do you believe that would have been the meeting that you attended with the proponent of the Vasia Talega project and the agency heads?

A I think that's the meeting.

Q In that paragraph it indicates that the purpose of the meeting is to expedite the endorsements pending for the project.

Is that consistent with your recollection of the purpose of the meeting?

A The real purpose is known only by Engineer Mota. I infer that he was trying to inform himself in order to have a complete picture and to take a decision or whatever.

Q Is it the normal practice at ARPE to write letters such as this to the governor's aide informing him of the status of projects?

A I personally never did it. And the only case at ARPE that I know of is this one.

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Q Did there come some time in 1988, if you recall, when you asked Mr. Marcano to prepare a history of the Vasia Talega project for you?

A They had an old history prepared. What they did was they updated it. And the only thing they were told was that anything else, to keep it up to date. That's it. That was old and when I began, when I came to know the project Ramon Ayala had it. That's why when I mentioned Ramon Ayala, which is the person Marcano has always told to update it.

Q Well, did you request Mr. Marcano to have Mr. Ayala update the history?

A I don't recall. Possibly I may have said so. It's a normal process in a case where there's any problem.

Q So in a case where there's a problem you might request your subordinates to prepare a history for you?

A It can be prepared. It can be requested. And sometimes they'll do it because the lawyers, specifically lawyers of ARPE, in order to have a complete picture they need that.

Q And the reason you want a complete picture is so that you can resolve the problem correctly, is that right?

[59]

A Well, what happens is a case with a long history, if the Administrator doesn't ask for it the lawyers will ask for it.

And the advantage of it is that you can go having a history and digest it, mentally digest it, and that's why the histories are made, but that's not in every case. Especially in the cases that go to court or where they ask the status of the case it's made up and it's answered. That's an agency routine.

Q Okay. Do you recall reviewing a history of this case that was prepared by Mr. Ayala?

A Yes, I've seen it.

Q I'd like to mark a document here as an exhibit and show it to you. I'm going to hand you what we are marking as Exhibit R-3 to your deposition. I'd ask if you could review that carefully and then I'd like to ask you some questions about it. I'm also providing a translation.

(Pause while deponent reviews above-mentioned exhibit.)

BY MR. RICHICHI:

Q Have you had a chance to review that document?

A Superficially I've seen it.

Q As we go through the document if you feel there's any portion of it that you want to read more carefully please do so. I'd like you to take as much time as you feel

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comfortable taking to go through the document.

(Discussion off the record.)

BY MR. RICHICHI:

Q All right, this appears to be, on its face, an ARPE memorandum from Marcano to yourself, dated January 23, 1988, is that correct?

A Yes, apparently.

Q All right. And it's — the subject is a chronology of events for the Vasia Talega project, is that correct?

A Yes. This is prepared by Engineer Marcano. I think it's he who should say whether it's correct or not. And as I said before, . . .

Q We are getting a little ahead of ourself. I just want to make sure we're talking about the same document.

On the first page of the document, on its face, it indicates that it relates to a chronology of events for the Vasia Talega project.

A Yes.

Q Do you believe that you've seen this exhibit before today?

A Yes, I've seen it.

Q This was one of the documents that was prepared for the file of this case?

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A Yes. So that everybody, the lawyers and themselves would have a picture.

Q Were you ever at any meetings in which the contents of this memorandum were discussed?

A There is one, that's older than this which was prepared by, I believe, Ramon Ayala. What may have been done is that this may have been updated by adding to the sequence of events which occurred subsequent to, for example, the agency letters which were mentioned, which is new, although this is dated January 23rd. I know there was one previous to this which is — probably what he did was copied it and added to it. That's what I understand.

Q On the second page of the exhibit there appears to be a listing entitled "communications received from agencies". Do you see where I'm at?

A Yes. Those communications were in the file. They should be there.

Q And there appear to be eight of those communications with the latest being October 17, 1986.

A Yes.

Q Okay. And if I could direct your attention to item number 5, there appears to be a reference to a September 9, 1987 communication. Can we agree that that would appear to be a typographical error?

[62]

A It could be. That would have to be explained by the persons who dealt with this because I don't have the facts.

Q Okay. It does make reference to an inter-agency meeting and I believe we discussed a short while ago such meeting that occurred with respect to this case in 1986, on September 9th. Is that right?

A Yes. Yes, I think so.

Q Then I — I don't want you to think I'm trying to mislead you or anything, but I will represent to you that my recollection is during Mr. Marciano's deposition yesterday he indicated that that was, in fact, a typographical error, which the record will bear out.

Did you give Mr. Marciano any instructions with respect to the preparation of this memorandum?

A Of this one?

Q Yes.

A He sent me a memorandum. I may have asked him for some fact. I don't recall having asked him. I may have. What happens is that sometimes the attorneys, that since the legal department is answerable directly to the Administrator,

and when the legal office asks for information, needs information, they'll ask it of the Administrator so that the Administrator will then ask it of the other person

[63]

and follow the hierarchy. That may have happened. And to obtain the complete picture of the status of the case at the moment.

Q The legal department reports directly to the Administrator?

A That's correct.

Q If I can direct your attention to the fourth page of the exhibit — do you have it in front of you?

A Yes.

Q On its face does that appear to be entitled "a chronology of events for the Vasia Talega project"?

A Yes, that's what it seems to be.

Q Do you have any information which would lead you to believe that . . .

THE INTERPRETER: He's on the wrong page.

MS. ROJAS: He's got the wrong page.

MR. RICHICHI: I think there may be a difficulty because the numbered pages don't correspond to necessarily the number of pages in the document.

BY MR. RICHICHI:

Q Starting from the first page of the exhibit and going to the fourth page of the exhibit, on that page there appears to be a title relating to the chronology of events for the Vasia Talega project, is that correct?

[64]

A Yes, that's what it says there.

Q Do you have any reason to believe that the events reflected in that chronology are not accurate?

A I have no facts.

Q If I could direct your attention to the last page of the exhibit, directing your attention to item number 31, it's next to the December 22nd, 1987 date, it indicates, does it not, that on that date PFZ Properties filed a lawsuit in this case?

A Yes, that's what it says here.

Q And you understand that you have also been named a defendant in this case?

A Yes.

Q Was that your understanding at the time the memorandum was prepared?

A With the understanding of what?

Q Did you understand as of January 21, 1988 that you had been named a defendant in the case?

A Yes, because in December 22nd they subpoena you at the agency or they served process at the agency.

Q So this case would have been of particular interest to you?

A None whatsoever.

Q This case was of no interest at all to you?

[65]

A I have the interest that I would have in all the cases before the agency that have to be solved. But that I would have a particular interest that it be solved, that the case be solved one way or the other by approving, returning or denying. As a matter of fact, practically the only administrator that moved this somewhat was me.

Q So you took action to see that this case was acted upon, is that correct?

A I told them to meet and reach some determination so that the case would no longer be pending before the agency and to finally determine the status of the case. And as a matter of fact, I returned again to the lawyers because when the complaint was filed the attorneys had to request, make a petition to Justice for the representation of the agency and myself and that a status be presented to the Department of Justice so that they could prepare themselves.

Q You said you told them to meet. Told who to meet?

A Engineer Marcano and Engineer Pedro Juan Sanchez, Engineer Rejelo Gautier and Engineer Ramon Ayala and Engineer Jorge Colon. Because all these people have been in some way involved in the case. And of course, the lawyer or female lawyer.

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Q Item number 29 indicates that in February of '87 a meeting was held with members of the ARPE and Mr. Mota to discuss the agency's positions on the project. Can we agree that that's a fair representation of what's said there?

A I don't recall having been at this meeting but if it says so here, and since this was prepared by persons that were involved, I imagine that that must be so.

Q So you have no specific recollection of that particular meeting?

A No.

Q If I can direct your attention to the second subparagraph under item 29, it indicates that there was a recommendation — do you see where I'm at?

A Yes. The recommended preparation of communication?

Q Yes. That appears to indicate that there was some recommendation that a communication be prepared to go to the proponents indicating the situation with respect to agency endorsements. Do you recall any discussions with

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respect to that recommendation?

A No, I don't recall.

Q Do you have any . . .

A I think the person that should know about this is Engineer Marcano. Possibly these instructions were given directly to him.

Q So you have no information which would contradict anything that Cruz Marcano would say about that particular recommendation?

A Well, I personally have nothing.

Q Okay. Do you recall approximately when Mr. Mota stepped down as Administrator?

A Yes.

Q When was that?

A February 28, 1987.

Q Okay. And as of that moment you became acting Administrator of ARPE?

A Yes, acting Administrator. Interim. The first day of March.

Q After you became Administrator of ARPE were you advised as to the status of the Vasia Talega project?

A In Marcano's working group continued working with this.

Q And did you ask them for any status reports on

[68]

the case?

A Sometimes we in our monthly reports, we would put the impact, the cases of impact, and when the case continued a follow-up was made. You would ask why this case had not been filed, what's happening, and that's why a follow-up was given to this case like any other one that was pending.

Q After you became Administrator of ARPE in 1987 did you have any communications directly with the proponent of the project about its status?

A I don't recall. The general norm is that those communications, if they're had at all, are done through the program or the person in charge of the program, because when a case is pending for whatever reason it doesn't have to go to the attention of the Administrator. They can intervene directly. I don't recall. If it's not in the records or if Marcano made some communication, I don't know.

Q Luis Rodriguez met personally with you in the summer of '87 to discuss the status of the case, did he not?

A It may have been that he may have been by the office sometime and perhaps if he went — I honestly don't recall.

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Q But you had been at the meeting where all the agency heads had been present, is that correct, in 1986?

A Yes, I was present. I think so.

Q And I believe you indicated that it was unusual to have so many heads of agencies come to a meeting such as that, is that correct?

A I had never done it and I had never known of it being done. That was the only case I had seen. Perhaps that may have been a determination made by Engineer Mota to try and clarify all points, but . . .

Q You realized that this was an important case, did you not?

A This was an important case. We call high impact cases or impact cases any case of a hundred thousand dollars or more.

Q So did you make any attempts to follow up on the case and see that it was resolved?

A Yes, I told them to meet and try to reach some determination. As a matter of fact, they met in the Deputy Administrator's office and sometimes they met there complete

[70]

days and they discussed.

Q When did that meeting occur?

A Those meetings occurred during last year, perhaps for July or before July, somewhere around there.

Q So there were a number of meetings?

A Among themselves, yes. Once they started with the case they met whenever they felt like it, whenever they determined to do so.

Q And at some point they met with you, is that correct?

A Yes, they informed me of what they were looking for and the status of what they were doing, whether they were going to continue the meeting tomorrow — just merely informing me that they were continuing with the case.

Q Did you give them any special instructions with respect to their meetings?

A I just told them to determine whether the case was active, whether it was in effect, whether it was closed or whatever.

Q Did you have any reason to believe it wasn't in effect?

A No, none. That's a determination which they made, totally made by them.

Q And these meetings occurred in July of 1988?

[71]

A More or less. I say July because they sent a letter, I believe it was in August, and I assumed that in July and possibly before July, in June, they were meeting several times.

Q And this was more than a year after you became ARPE's Administrator?

A Yes, more or less. But the responsibility of dealing and determining of the cases was completely theirs. The thing is that when one sees the reports and we see that, one knows that there are cases pending, and if the engineer came to — I question them about it and if the engineer came to see me to ask me about the case, I naturally have to give follow-up on it.

Q Why did you wait more than a year to direct them to resolve this case?

A Because that's not a responsibility of the Administrator. It's a responsibility of the Director of regional operations. It's a responsibility that he had to take without any need for the Administrator to call his attention or reprimand him because the case was not solved.

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Q Did you reprimand Mr. Marcano for not acting on this case?

A I several times called his attention so that he would make a decision on the case, not only to him but to all of them.

Q I guess my question was did you reprimand him for not taking action on this case?

A What do you mean by a reprimand?

Q Were you upset with him?

A I demanded from him on several occasions that he meet and follow up on the case. That's a reprimand . . .

Q Did he give any response to you?

A Then came these quick succession meetings.

(Discussion off the record regard-the translation of the answer.)

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Q And who was involved — well, what was decided with respect to the request for reconsideration?

A Denied. It was denied.

Q Who communicated this denial to the proponent?

A That was a letter prepared by the group and brought it to me. That letter was made by the group, perhaps by the lawyer, Marcano. Perhaps Jorge Colon. They met between them and they brought the letter and they told me that that was the determination and so that the case would not delay any more, I said okay, I'll sign it. And I signed it. But they prepared the letter and they made the determination.

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Q A moment ago we were discussing a letter that was prepared denying a reconsideration with respect to the Vasia Talega project. Is this the letter to which you were referring?

A Yes, I understand that to be correct.

Q And you testified, did you not, that this letter was prepared for your signature by others?

A Yes, that's correct.

Q And who were those other individuals?

A To my best recollection the attorney must have intervened in this, the Deputy Administrator, possibly the Deputy Administrator, the female lawyer. The one who should have signed this letter was Marcano. I don't recall whether it was that Marcano was not in the agency, on vacation or something, but definitely he intervened because the reconsideration was made directly to him. I think he was not in the agency or some problem occurred and so as not to continue waiting on the case, the case was prepared. Marcano should know who

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prepared it or if he prepared it, he intervened or if Colon intervened or Ayala or Sanchez or the female attorney. And once they prepared it they brought this letter to me, and that perhaps my error was to have it signed.

But I had absolutely nothing to do with the preparation of the letter.

Q Did Mr. Gautier assist in the preparation?

A It's possible. They met, they were meeting.

Q Did you participate in the determination?

A No. Not in any way whatsoever.

Q Are you telling me you just signed what was put in front of you?

A Yes, because they told me, they brought me the letter and they told me that this was the determination that they had reached, that the facts had not changed, and as a result of this they prepared the letter for me. I don't know whether it was that Marcano was not there or why it was, but so that the case would not continue at the agency, this letter was signed.

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Q Did you see any drafts of the December 16, 1988 letter before you signed it?

A No. What happens is that they discussed it and they said that the determination was the same and they prepared the letter. I don't recall if Marcano intervened in the drafting of the letter. He must have intervened in the meetings to reach this conclusion. I don't know who specifically. I know it came from the group who made the letter.

Q Did you have any discussions with members of the group while they were preparing the draft?

A No, none.

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Q You said according to their criteria. Who do you mean by "their"?

A That the criteria of Cruz Marcano, Gautier and all the people that intervened, they agreed that the decision would be the same and to prepare the letter denying the request for reconsideration.

Q Did Cruz Marcano tell you that the decision would be the same?

A I don't know who told me. I know the group came to tell me, including, I think, the attorney. I don't recall exactly who was there.

Q Do you recall how long before December 16 the request for reconsideration had been made?

A Here it says August and September. I presume that that's it.

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Q You believe that Mr. Marcano knew the most about the case, is that correct?

A Yes, definitely.

Q And you believe he was on vacation at the time of the letter?

A I know he took some vacation. But the letter they had had for four months, as you said, they were evaluating it, studying and evaluating it.

Q So the group had the letter under consideration for four months?

A That's what I understand.

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Q Did you express any concern that it was taking almost four months to respond to the request for reconsideration?

A Well, perhaps they were taking, studying the reconsideration. There were being meetings and the attorneys also, and they had to get advice, not only just review the files, but also in the positions that they were adopting or making and evaluating also with the attorneys for the agency and obtain guidance until they made a final determination.

Q The letter that you wrote — I'm sorry, I take that back.

The letter that you signed merely reaffirmed the earlier decision, did it not?

A Yes, because that's the determination they finally reached after the research they made on the letter and the meetings.

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Q Why did it take four months to rule on a matter that had already been decided upon if there was no new evidence to consider?

A If I were you, I'd pose that question to Gautier and Marciano, because they were the ones that finally decided that. But I understand that it was they didn't have

[89]

all the elements or the full elements to make a determination. You send a letter, the letter is a very detailed letter and it has to be answered carefully.

Q Don't reconsiderations have to be ruled upon by the Administrator?

A No, sir. They can decide that.

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Q Okay. This letter is dated October 5, 1988, is it not?

A Yes.

Q And that's your signature at the bottom of the page, is it not?

A Yes.

Q And in the letter you request any documents submitted to the Acueducts & Sewer Authority by PFZ since 1982, is that correct?

A Yes. What happens is that when the reconsideration is requested, in the analysis that they were making they requested these things, thinking that perhaps some evidence which may have been submitted would weigh on the decision to be taken.

This is probably the reason why it took four months to answer the case.

Q Why were you requesting any documents they had received from Basura and Rodriguez since 1982?

A This is a determination made by the work group,

[91]

that they wanted to have that fact in the event that some evidence arose that they thought would be relevant to the case, they would want to have it, have it available.

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Q Do you recall what the basis was for denying the effectiveness of the Vasia Talega project in the first place?

A Well, I think what happened was that they reached a conclusion that the plans that had been submitted were incomplete plans and as incomplete plans, they searched through all the ARPE regulations and of the Planning Board, and after a final total analysis of all of that, they reached that conclusion.

Q Did you agree with that conclusion?

A Well, that was one of their conclusions.

Q Did you ask them to substantiate it?

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A They did so in the letter that they sent them. It's supported.

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Q So you wanted Basura and Rodriguez to get a response very quickly, is that correct?

A Well, that the petitions and letters that they had in the agency related to that case.

Q If you were in such a hurry to respond to them in this letter, why did the reconsideration take four months to resolve?

A Well, this is a case that had been being discussed for a long time and it was sent in this type of thing. What happens is that the reconsideration arrived in, they make certain statements with some basis, and they had to evaluate and answer, not just say denied without evaluating anything.

Q Did you discuss this letter with Mr. Marcano before it was sent?

A No. They sent me copy.

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Q But you were a defendant in a lawsuit over this project, were you not?

A In the case they were alleging that it had been around for a long time and had not been decided. And the case was in the process of decision.

Q Did you review this letter before you signed the December 16th letter denying reconsideration?

A No, because they told me that the decision was a thing and what they did was make a catalog of all the things that were contained in the plans that he had submitted and all the things that were missing from the plan. And I think it was that the attorney may have advised them to do it that way.

Q When you discussed with the group the conclusions which were reached in this August 2nd letter, who communicated to you their views regarding that?

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[101]

Q My question is a very simple one. Did you ask them about the basis for their decision?

A Well, the basis was that they didn't meet the regulations. They didn't comply with the regulations. They told me that. I wasn't going to question it.

Q Okay. Did they explain to you in what respects the regulations had not been met?

A It says here that they had not complied with Resolution 139 nor Article 67 of the Regulations on Subdivision. That's in the law and in the regulations.

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[102]

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Q In the letter it mentions some plans submitted by Basura and Rodriguez entitled "preliminary project plans". Have you ever seen any of the plans associated with the Vasia Talega project?

A I think I had seen the plans that they had there on some occasion. But only the distribution plans. What they were proposing. Going into detail on sheet by sheet, that I didn't do.

Q Did you ever have the plans in your office?

A Yes. They took it on some occasions to my office. When the case is discussed they bring all the documents and all the files, including the plans, and you study the totality of it, the letters, the endorsements.

Q Were the plans which you saw entitled "preliminary

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[104]

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Q Did you give them any advice on how they should handle particular matters related to their determination?

A That's a jurisdiction exclusively and totally theirs and they are people with experience and they know what they have to do.

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[110]

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Q The letter which you signed denying reconsideration appears, does it not, to be referring to plans for structures?

A I understand that those were the plans that Marciano had there pending. They obviously had no other plans. I don't know if you asked him, but Marciano should be able to explain that.

Q Well, Mr. Marciano will explain that but I want to know what you understand right now.

Was it apparent to you that the group had looked at the wrong plans?

A But that's the plans that they had. If they tell me, as they told me, that's the plans that they had. What I understand is that they have no other plans other than those.

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[113]

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Q I'm going to try again because obviously you're not understanding my question.

At this point I'm not interested in what they told you. All I want to know is what you asked them. And what I'd like to know is whether you asked them whether they reviewed the correct set of plans.

A They always told me that they had one set of plans. And if they have one set of plans, they're going to review that set of plans. I don't know if there are two sets of plans as the letter states. If there are, then it's Marciano who should know about it, or Colon or Ayala or Pedro Juan Sanchez.

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Q So even though he specifically told ARPE it was looking at the wrong plans, your technicians prepared a letter for your signature denying reconsideration based on a review of those very plans which he said were the wrong ones?

A Well, if he says they're the mistaken plans but our technicians are the ones that have the data and the plans and they don't have any other plans. And that's that plan that they have submitted in there.

Q Did you ask any of them to inquire of Mr. Rodriguez what he was talking about?

A But that's their responsibility. They have to know about that. And they did a detailed search, a thorough search of all the ARPE files and everything that was there from Vasia Talega and the only thing that they had was that, that they told me they had was that.

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Q So after you got the August 17th letter you asked that they search again to see that they had the right plans?

A I told them to meet and to search for all the data so that they could answer the letter. That was their responsibility, to look for all the information.

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Q In Mr. Marciano's letter he indicates that ARPE is returning the last copy of the referenced preliminary project plans back to Mr. Rodriguez, is that correct?

A That's what it says here.

Q It also indicates that Jorge Colon sent the others back in March of 1982, is that correct?

A Yes.

Q If you could refer to Mr. Colon's March 24th, 1982 letter, he indicates, does he not, that he returned the anteproyecto but he kept the construction drawings, is that correct?

A That's what appears from the documents.

Q Would it then appear from the documents that Mr. Marciano in his August 2nd, 1988 letter is not referring to the construction drawings that Mr. Rodriguez submitted?

A That seems to be so. However, I think that what Marciano is saying here is that these plans that he had are what the proponents says are the construction plans and he understands that they're not. Wherefore, I presume that he has no other plans to the point that he says he is returning the last copy that he has, that he has no other.

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[124]
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Q When you read the August 2nd, 1988 letter and Mr. Rodriguez' August 17, 1988 letter, did you direct someone to speak to Mr. Colon to clear up this matter?

A No, because those letters were addressed to Marciano and it was his responsibility to deal with that.

Q So you think that Marciano's reference to preliminary project plans refers to the same plans which Luis Rodriguez called construction plans for urbanization works?

A That's what I understand from the letter and from what was being explained constantly, all the time, to me.

Q Luis Rodriguez enjoys an excellent reputation as an engineer in Puerto Rico, does he not?

A I understand that to be so.

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Q Do you believe Jorge Colon would confuse such

[125]

drawings?

A I would pose that question to him because he was the one that prepared that.

Q You must have an opinion of him. He worked for you, did he not?

A He has knowledge of this and everything, but as a matter of fact those plans that are available, the ones that he returned in the letter had been in Colon, Marciano and Ayala's possession and they came to determine in August that the plans were not construction plans. I think they should know it. After several meetings and to look through files and review the plans that they had there, which they had no others, they tell me that they had no others, and they tell me that they reached that determination.

I don't know if they're the ones that Jorge Colon mentions in his letter. I don't know.

Q Mr. Rodriguez told ARPE in his August 17, 1988 letter that there were two sets of plans and the plans you had looked at were not the construction plans, is that correct?

A Yes.

Q Do you believe that he was telling you the truth when he made that representation?

A I have to rely on what my technicians told me, what's in the records. I'm not doubting but I'm also not in

[126]

doubt from my people. I have to answer based on the evidence in the agency, not what's said in a document.

Q Is it possible that the agency lost the construction drawings?

A I don't know. I don't know.

Q You don't know whether that's possible?

A A hundred files could get lost. That's a possibility. But nobody of all the people that were dealing with that case for so long has brought that evidence nor has it been brought to the attention of the Administrator nor have they themselves, that that has happened.

Q The evidence is in front of you, isn't it?

Mr. Rodriguez indicated in his February letter that he was submitting five sets of construction plans, is that correct?

A Yes, he says so.

Q In the last paragraph of Mr. Marciano's August 2, 1988 letter he indicates that ARPE only has one set of plans, is that correct?

A That's what he says, yes.

Q Where did the other four sets of plans go?

A I don't know. If Marciano and Jorge Colon and Ayala don't know, I also can't tell you.

Q They could be wrong, couldn't they?

[127]

A All humans can be mistaken. And the proponent could also be mistaken.

Q But it appears in this case that Mr. Marciano was incorrect, isn't that correct?

A I'm sorry, I couldn't give an opinion as to that, or give that opinion. And he swears and reswears that that's the plan he had.

Q It's the plan he had but it isn't necessarily the construction plans for urbanization works which Mr. Rodriguez submitted, isn't that the case?

A I can't answer that. I don't know.

Q But you signed the letter...

A All right, but that's the plan that they told me that they had, the only plan that they had. They don't show me any other plan.

Q You issued a ruling with your December, 1988 letter and you can't say whether or not the construction plans were in fact submitted but not reviewed?

A Well, they're always saying that those are the plans that the proponent says are the construction plans. And those are the ones that they state that are not. If we had had some other plans different from those we would have answered based on those plans.

Q Where in all of the records does Mr. Rodriguez

[128]

ever say that the preliminary project plans are the construction plans for urbanization works which he submitted?

A That's what my technicians told me, that the plans that they have are those, and those are the plans that are in Mr. Cruz Marciano Robles' office, and Cruz Marciano understands that that's what's being called construction plans.

Q But Mr. Rodriguez never claimed that the construction plans were the same as the preliminary project plans, did he?

A No, in the letter he doesn't say so.

Q And he never makes that claim anywhere else, does he?

A I haven't seen it. I don't know.

Q Well, in the August 17th letter he in fact says that there were two different sets of plans, isn't that correct?

A Yes.

Q If I could direct your attention to Exhibit R-4, which is your December 16, 1988 letter. Do you have that in front of you?

A Yes.

Q On the first page there is a list of plans, is there not?

A No, it's a list of sheets.

[129]

Q Actually you describe them as sheets of plans, don't you?

A What happens is that the totality of the sheets make up a plan. It's a set of plans. Not that each one consists of a separate plan. The totality of all of them make up a plan.

Q Okay. And that is the plan which ARPE reviewed in denying the request for reconsideration by the proponent, is that correct?

A I understand that that is so, but that question should be answered by Engineer Marciano, who is the one that had them and reviewed them and knew which were the plans.

Q But your subordinates told you, then, that those were the plans which they had reviewed, is that correct?

A Yes.

Q And those are the plans that Mr. Marciano refers to in his August 2nd, 1988 letter?

A I understand that's correct.

Q And those are the plans which Mr. Rodriguez told you were not the construction plans in his August 17th letter, is that correct?

A That letter was sent to Marciano and I told Marciano to review the letter and to answer it.

Q And in that letter Mr. Rodriguez told ARPE that

[130]

these plans were not the construction plans, isn't that correct?

A Yes, it says so there. But I understand that we don't have any other plans other than those.

Q If you could direct your attention to item number 9 on the plan.

A Yes.

Q And item number 9 on the December 16, 1988 letter refers to sheet number 9 as an elevation, does it not?

A Yes.

Q Please look at Exhibit R-8, which is Mr. Rodriguez' submittal letter of February 22, 1982. I'd like to direct your attention to the last paragraph in that letter.

A Here?

Q Yes.

A Yes, I already saw it.

Q That paragraph refers to construction plans for development works and advance approval of general earth moving works, is that correct?

A Yes.

Q Would you associate those plans with construction drawing for urbanization works?

A Yes.

Q And Mr. Rodriguez specifically indicates that

[131]

those are reflected on sheet number 9 of the construction plans submitted, is that correct?

A I don't understand the question.

Q In that paragraph Mr. Rodriguez indicates that sheet number 9 of the construction plans which are being submitted refer to general earth moving works.

A Yes. However, in Marciano's own letter to you in which he returns the plans, that the preliminary project plans, which is what he has there, are not considered advanced plans nor plans for the movement of earth, which is what he says here, but which is not what he has. He is basing it on what he has available there. Marciano or Jorge Colon would have to explain this because as far as I'm concerned, they have nothing else.

Q So as you just explained, it is obvious that Mr. Marciano was not referring to the same construction plans which Mr. Rodriguez indicated he was submitting, isn't that correct?

A Possibly no, but that's what he has there. He has no other plans.

Q Did you not just explain that what Mr. Marciano is referring to are not the same construction plans which Mr. Rodriguez indicated he was submitting?

A But he said and he insists in saying that what

[132]

he has before his consideration, and he only deals with construction plans, is this which he returned. He has nothing else.

Q I'm not sure if you're disagreeing with me.

Are you agreeing that what he's referring to, Mr. Marciano referring to in his August 2nd, 1988 letter, is not the same construction plans which Mr. Rodriguez indicated he submitted back in 1982?

A According to the letters it's not the same. But what he has over here, one has to assume that Marciano assumes the responsibility that what he has, that that's what he has there, that he has no other plans different from these.

Q And Mr. Colon indicated, did he not, in his letter that ARPE had received construction plans for urbanization works?

A Yes, he says so.

Q So if you read Mr. Rodriguez' letter and Mr. Colon's letter, it appears as though Mr. Marciano was looking at the wrong plans, isn't that correct?

A Well, Marciano may be looking at the wrong plans, but he has no other plans. I don't know if you asked him this. He should explain it. I can't. I don't know if there are any other plans.

Q So can we agree then that Mr. Marciano may have
[133]

been looking at the wrong plans and making an evaluation with respect to this project?

A I wouldn't conclude that. I would ask that of him because he bases his decision on the plans that he says he has.

Q The only support for Mr. Marciano's position is that those are the plans which were in the file, is that correct?

A Yes. That's what he sustains.

Q And if those are the correct plans there should have been five sets of plans in the file, shouldn't there?

A I don't know. According to the letter there were five. The letter says that there are five plans. That should be asked of Jorge Colon and Marciano, who are the people who dealt with the plans and have always been dealing with the case.

Q When construction plans for urbanization works are submitted, how many copies must be submitted?

A Normally there's five copies.

Q When you read Marciano's letter did you ask him why there was only one copy still in the file?

A He says that's the only copy he has. Apparently the rest had been returned to him.

Q Did you ask him why ARPE was — let me finish
[134]

my question, please.

Did you ask Mr. Marciano why the remaining sets of construction plans were returned?

A No, because this is a decision made by Marciano with his group there, he meets over there. I didn't intervene whatsoever in this decision, in this determination.

Q Now with respect to your December 16, 1988 letter, does it appear as though you're talking about a different set of plans in that letter than the construction plans that...

A I understand that that letter is referring to the same plans referred to by Marciano. And that should be explained by the people who prepared that letter and intervened in that determination.

Q If one looks at the February 22nd, 1982 letter which Mr. Rodriguez wrote and looks at your December, 1988 letter regarding the project, you can come to no other conclusion, can you, than the plans referred to in your letter are different than the construction plans to which Mr. Rodriguez refers?

A But however, that is in compliance or adjusts to what is said in Marciano's letter. When I'm brought the case I'm brought the — they don't bring me these letters, they give me the case already digested, analyzed by engineers.

[135]

attorneys and they all reach that conclusion.

Q Are you saying that the attorneys reached the conclusion and not the engineers?

A No, that they participated. The attorney in ARPE does not make determinations. He just advises.

Q But the attorney cannot say what the facts are, is that correct?

A But guides him as to what he should answer and analyzes the information that he has.

ARPE attorneys have a lot of experience in plans and they have a lot of knowledge about plans.

Q But did you review these plans that were in your December 16, 1988 letter?

A No. They reviewed, the group reviewed those plans.

Q If I can direct your attention to the third page of that letter, whose initials are those on the lower left-hand corner?

A Those are my initials.

Q Do you know who the other initials are?

A These could be Carmen E. Chiquez, the attorney. It could be the attorney. That must be the secretary's. I don't recall. Marciano should know. One of the boys there dealt with this.

[136]

Q Who in ARPE decided the facts in this case? The engineers or the attorneys?

A The engineer in this case, the engineer, but counseled by attorneys. What happens is at ARPE they have an assigned lawyer because when there's a suit in a case the legal office has to assign it to a lawyer and the lawyer has to give it a continuous follow-up and meet with the engineers through the different stages and he's the person that coordinates with the attorneys from the Justice Department all the proceedings or all the handling of the case from there on in.

Q Does it appear from the documents which you reviewed today that ARPE may have misplaced the construction drawings and reviewed other drawings?

A I think you should address that question to Marciano or Colon, since they intervened in the case and the plans. Maybe they can remember that that was the situation.

Q But I'm addressing the question to you. It will also be addressed to them.

A From what the letters say, it's possible. But not necessarily.

Q Is it enough to raise doubts in your mind?

A Well, they brought me all the information, all the facts, and it should have been raised in their minds. But apparently they have no other facts, they have no other

[137]

document.

Q Well, how difficult would it have been to contact Mr. Rodriguez and ask him about the construction drawings?

A That's a determination that if it had come to Marciano's mind when he started that, maybe he could have done it. I don't know if he did it.

Q But from your point of view it would not have been difficult, would it?

A Call him and ask him something, that could have been done. That could be done. It wouldn't be superfluous, it could have been found out, and inclusively, Jorge Colon, who was the one who wrote the letter, intervened in this determination.

Q It would be a matter of some embarrassment for you, would it not, as Administrator of ARPE, if they had in fact reviewed the wrong plans?

A I think they would have acted wrong? They shouldn't have acted that way?

Q It would have been a matter of some embarrassment to the agency, would it have not, to have conducted all these meetings of high-level officials in 1986 only to find out that ARPE had reviewed the wrong plans, would it not?

A What happens is that the people who were

[138]

dealing with the plans understood that those plans were correct, that they were all right. And it's that the case is moot because Engineer Rodriguez writes a letter to Engineer Mota requesting clarification. In the file that I recall there's a letter which was sent, I believe, in 1984 where Engineer Rodriguez was told that he had to determine, decide whether the plans that he had submitted would be, were going to be seen by the certification regulations or by the traditional method of reviewing the plans. And as the technicians informed me, the letter was never answered.

Q As Administrator of ARPE, it would have been embarrassing for you, would it have not, that the wrong plans could have been in your files for six years?

A I think one would feel badly if something like that happened, but I don't think there was intention. At least there wasn't in my part, and I don't think on anybody's part, of causing harm to anyone, and much less to Engineer Rodriguez who is known to everybody in ARPE.

As a matter of fact, I understand that Engineer Mota does the meeting, he does it with the very best of intention of helping Engineer Rodriguez in the case.

Q So you think in this case ARPE just made a mistake?

A No, I haven't said that. I don't have the

[139]

facts to say that.

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Q And after you received Mr. Rodriguez' August 17, 1988 letter, you personally made no effort to see that you got all the facts?

A No, the letter was not addressed to me. The letter was addressed to Engineer Marciano and they addressed another letter to Engineer Gautier. And it was their responsibility to review everything they had and to evaluate it.

Q But you issued the ruling on both letters, did you not?

A In which letters? I didn't make a determination in either of the letters. As a matter of fact, I gave instructions to Marciano and to Gautier to evaluate the case in detail and meet as often as was necessary and to take whatever determination was appropriate.

And they made their determination because that was completely their responsibility. And the letter of December that I signed was prepared by them. The proof is here — as a matter of fact I think this is Chiquez' initials — that she prepared the letter but it was with their advice.

[140]

And when they had it, I don't recall if it was that Marciano was not there, so that there would be no problem I told them go ahead and prepare the letter and I'll sign it and we'll get rid of that.

Q Mr. Rodriguez, are you aware that Mr. Marcano and Mr. Gautier have both testified under oath that they cannot recall ever seeing this letter?

A They had to have intervened in this. If not, you have to ask the lawyer because I personally did not, and she can tell you because I personally did not sit down to write this letter. The only thing I did was sign it.

Perhaps I committed the error of signing it when I should have told them to sign it.

Q So you believe if they said that they were not telling the truth?

A But I don't have the facts to determine that they were lying.

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[143]

Q Has anyone from the governor's office made known to you their views about the litigation?

A I don't recall. I don't think so.

Q Has anyone ever expressed any reservations about the Vasia Talega project to you?

A From where?

Q From the governor's office?

A No, none that I can recall. When Engineer Mota was there, apparently Luis Rivera Cabrerra sent him a letter, but that's the only thing I know. While I was there, nothing, nor having written any letter unless it was the routine of giving details in a monthly report on a particular case.

Q Do you know a gentleman by the name of Amadeo Francis?

A Yes, Amadeo. He's an aide to the governor.

Q Have you ever spoken to him about the Vasia Talega project?

A He may have asked something, to discuss some project or other, because he was assigned at Fortaleza to intervene with tourism projects. He may have asked me about the case but not specifically about the case. But when we discuss pending tourist cases, maybe that's one of the ones

[144]

that were discussed.

But if it was done, it was to discuss a series of tourist cases that were pending because he asked me on several occasions about tourist projects in Rio Grande, Dorado and the Condado. And sometimes there are things there that have expansions and when the cases are held up the people are calling, look, there's a case over there pending.

Q Have you ever heard the Governor of Puerto Rico make any reference to development in that area?

A I don't recall. I recall the senators that I mentioned. I don't recall — it may be that as part of public policy that there be some determinations — as a matter of fact, there were determinations concerning the use of the lands, but concerning the totality of the lands of Piñones and Vasia Talega, but without entering — or at least I have never informed the governor, nor has he asked me.

Q Well, what public policy references have been made that you're aware of?

A I think in the governor's annual message, the state of the commonwealth, there may be something, I think there's something related to Piñones and Vasia Talega. The Planning Board should know very well about this.

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[145]

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Q Has anyone from the Planning Board spoken to you about this project?

A To me personally, no.

Q To anyone on your staff?

A I don't know.

Q Do you know what the specific title is of the position that Mr. Amedeo Francis holds?

A Special aide to the governor. Or advisor. Special aide to the governor.

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Q Communications that you've had with him, have they been over the phone or by letter or both?

A No. On the telephone. I don't recall. If there's a letter, I don't recall. Unless he asked me in

[146]

writing the status of the case, and then I answered him. If he asked me on-the phone, normally I return, I answer him by phone also.

Q This message that the governor delivered, he mentioned Vasia Talega specifically in it? Is that your recollection?

A Yes, I believe he mentioned Vasia Talega and Piñones.

Q Well, did that raise your interest in the project?

A No. An interest, just the interest of a case that was there pending and had to resolved and a case of impact.

Q Well, you report to Fortaleza, do you not?

A I used to report, yes.

Q Okay. And your appointment comes from the governor, does it not?

A That's correct.

Q So when the governor made a comment in his state of the commonwealth message about a specific project you had under consideration, that didn't raise your interest?

A No, it wasn't about a specific project. It's about an area and the Planning Board must make a determination of how broad that area's going to be, whether it's going

[147]

to be it in its entirety or part of it. That's something that once public policy is established then the Board must make the corresponding studies to determine what area they understand should be reserved or conserved for public use.

Q But the Board had already given approval to the Vasia Talega project, had they not?

A What project?

Q Number 71093 URB.

A Yes. Yes, definitely.

Q So in order for there to be any change in that use, there would have to be a new Planning Board resolution, is that correct?

A Yes, of course. Definitely.

Q But that couldn't happen unless the project was no longer in effect?

A Well, it may be that the government might decide to expropriate part of Hato Rey and there are buildings on it — it's just that the government will have to pay for those buildings.

Q If the project was no longer in effect, as ARPE ruled, could the developer then go back to the Planning Board for another consultation?

A And as a matter of fact, if you decide that, if you feel that ARPE decided erroneously or mistakenly, and

[148]

you prove that ARPE was wrong, ARPE has the obligation to review again.

Q Is that what happened when you signed the December 16, 1988 letter?

A No, that's not what I said.

Q The reason why it was determined that the project was no longer in effect was that ARPE claimed construction drawings had not been submitted within the one year period, is that correct?

A I think that what Marcano means to say is that the plans are incomplete and since they're not complete, they didn't interrupt the time told in the statute and therefore we don't have a pending case.

Q So ARPE's position is that the project is no longer in effect because a time line was missed, is that correct?

A That's what Marcano says in the letter, that complete plans were not submitted.

Q Okay, and he was speaking for the agency through that letter, was he not?

A Yes. That's his responsibility. He has a delegative authority. And he has the faculty to approve that case if it were complete, or to deny it if he understood that it was inappropriate or...

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[150]

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Q What effect would the Vasia Talega project

[151]

have had on the governor's proposal?

A I don't know. Because I don't know what it encompasses or what it says.

Q Well, you heard his speech, didn't you?

A It's my understanding the Planning Board itself in the area of conservation, the conservation area that they have now did not include the PFZ lands.

Q What is that understanding based on?

A I don't know. That's something that the Planning Board determines. Maybe they understand that that lot can be developed or separated physically by the roads and practically the mangrove is insignificant.

Q My question is how did you find out that information?

A Because we're constantly consulting with the Board and in different cases and I think I saw a letter, a letter from the Board which spoke something about that. I don't recall.

Q Do you recall when you saw that letter?

A No. Some time ago.

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[152]

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Q Were you aware that in 1987 Basura and Rodriguez submitted some anteproyectos to ARPE for its consideration?

A In '87 or '88 they submitted something. I

[153]

think it was in 1988. I don't remember. I think they submitted something but that I can recall, I think it was in 1988.

Q Do you know whether ARPE accepted those...

A Engineer Gautier was of the feeling that those cases should not be filed because Marciano's case had not yet been decided. It was still pending decision. And then he received them and when Marciano's case was decided, then he decides the same thing and returns them.

Q Did you give any instructions to Mr. Gautier in that regard?

A No, I don't. That was his complete responsibility.

Q Do you know whether Mr. Marciano agreed or disagreed with the decision that the Vasia Talega project would no longer be in effect?

A I don't know that fact. They used to meet over there and reach a consensus, an agreement. I imagine there was a discussion, doubts and things. But finally they reached a consensus and I understand they were all in agreement with the decision.

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[155]

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Q But in February of '87, just before you became Administrator, a consensus was reached that with respect to the endorsements, a communication would be sent to

[156]

Basura and Rodriguez, is that correct?

A That's what the history says.

Q When you read the memorandum that Mr. Marciano wrote in January 21, 1988, which indicated that a communication was to be sent to Mr. Rodriguez, did you take any action on that?

A I repeat, Marciano had the obligation of making the determination, whatever it was, and if Mota gave him those instructions, then he had to do it.

Q Unless you directed him otherwise.

A No, I gave him no instructions. The only instruction I gave him was to continue evaluating the case until he decided it.

Q Did you give him that instruction before you received the January memorandum or after?

A It may be before that or after. The case was already being discussed and these are cases, I think, that are routine. And these are things that the Administrator shouldn't have to intervene to tell a person, look, you have a case pending, solve it. And if he had to get additional data or communicate with Engineer Rodriguez, he should do that too.

Q But with respect to the endorsements, this was not a routine case, was it?

[157]

A Yes, but those endorsements, if this was a final final construction plan those endorsements had to be submitted by the proponent. And according to Marciano's letter, those endorsements weren't there.

Q That's the August 2nd, 1988 letter?

A Let me see. No, he didn't say that in the letter. They base themselves on the fact that it didn't comply with the regulatory provisions but however, in this case that they prepared and I signed in December they mention at page 2 a series of things that were missing from the plans. So that then,

according to them, it could be considered as a final construction plan.

Q Was Mr. Mota in favor of this project?

A I don't know.

Q You never had any discussions with him about it?

A Well, I intervened when I went to the meeting that he called or the meetings he may have called, but to me personally, he never made a comment.

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A Yes, that's correct.

Q And you had to look at facts and form an opinion, did you not?

A Yes.

* * *

Q Based upon the facts which you've looked at today, do you have an opinion as to whether it would have been appropriate to sign the December 16, 1988 letter?

A If the plan that they have is this same one and they have no other and if Marciano says that that's the construction plan, and it doesn't say so in the letter but that's the one they have, then no other determination can be made. I don't know if Engineer Rodriguez visited Marciano and I don't know if they saw the plans and they knew what they had there pending. At least I have no knowledge of that.

Q If ARPE had in its possession no plans from 1982, do you think Mr. Marciano's decision would have been correct?

A What plans from 1982?

Q My question is if they had no plans at all from 1982...

A Because if they had no plans then there would be no case because there was no plans.

Q Or they were misplaced?

A I don't know.

* * *

[166]

Q In your December 16, 1988 letter you reference a set of plans which appears on its face to be anteproyecto for buildings, isn't that correct?

A That letter was prepared for me and they told me that those were the construction plans.

Q Well, do you think those might have been, in fact, the plans which Mr. Rodriguez submitted in November of 1987?

A I don't know because I don't have the facts. This information in this letter is all prepared for me by the work group. And they're the ones that determine that. And they prepared the letter for my signature. I don't know if it was that Marciano wasn't there. And I signed it and that's it.

Q Well, if Mr. Marciano's letter was based on review of the plans that were submitted in November of 1987, then his letter would have to be incorrect, wouldn't it?

A If that is so, then it must be incorrect.

Q When you — when the letter of December 16, 1988 was written, what documents in the file were used to prepare that?

A You would have to ask the group about that because I didn't intervene with that.

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[167]

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Q So there had to be some copy of what Mr. Marciano claimed were the 1982 drawings which were used to write the December, 1988 letter. That's common sense, isn't it?

A It may seem to be. It could be. It could be that they got a photocopy. I don't know. And they may have taken facts or maybe the lawyer may have alerted them to it because if I were the attorney and I'm going to return something I would at least make an inventory or keep copy of it. But I don't know how they did it. I don't know.

Q So it's reasonable to assume that there should

[168]

be a copy of those 1982 drawings, either a photocopy or some other notation in ARPE's files.

A It could be but I don't know.

Q You don't know whether in fact there still is such a copy?

A I don't know. If it exists Marciano must know about it.

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[170]

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Q From what we've seen today, it appears as though there's some question as to whether all of the plans which were submitted were in the files.

A There are mentioned some letters in which he said there were five sets of plans or five copies, and when Marciano answers he says that there was only one copy.

There are discrepancies which Marciano or Jorge Colon should explain because they're the ones that have the knowledge of that.

Q You asked them to provide you with information and respond, prepare responses to the inquiries, did you not? Along with others in the group?

A No, because what happens is that I don't intervene in this. That's being handled by Marciano and the group that's working with it. And then they're the ones that deal with this. They have all these facts. They must have some reasons, or they may have some reasons and they may have some explanations for these things you're asking.

Q If they only had the 1987 plans which Mr. Rodriguez had submitted, then one explanation could be that Mr. Marciano's letter is a fabrication, is that correct?

A If that is so, Marciano should explain that,

[171]

because if that is so there's something that doesn't jive or the dates of the plans or the dates of the letter, he must have the evidence of the fact to support this.

Q In Mr. Jorge Colon's 1982 letter he does not indicate that he is retaining any of the anteproyecto, does he?

A That's what it says.

Q Well, if none of those plans were retained, then Mr. Marciano's August 2, 1988 letter would be a fabrication?

A Well, it could be that he is mistaken then.

Q It could be that he's mistaken or there has been some intentional misleading?

A Whatever it is, I personally do not know, and that he should be answerable for that.

Before I forget, something just dawned on me. We were looking a little while ago at letters and I just saw some initials which said G.C.R. I think that's Gideon Carmona. That's my letter of the 16th and Gideon Carmona is the secretary. I think, or was, of Attorney Chiquez. And that implies that the letter was made in the legal office, or at least the typing was in there. That just dawned on me, I remembered the girl.

Q Do you know if the engineers prepared a draft

[172]

for the legal office to review?

A I understand — a draft of the December 16th letter?

Q Yes.

A I understand that they had to have intervened and perhaps prepared, and maybe the attorney just intervened in the assisting of the drafting of the letter, and the typing of the letter itself may have been done in the legal office.

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[174]

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Q You were acting on the advice of all of these, the attorneys and the engineers in this group that was looking at this issue, is that correct?

A No. I didn't act. They acted. I supervised them to make sure that they decide whatever had to be decided.

Q So you were relying on the information they were providing to you?

A Yes, that's correct.

Q And that was the same information which would have to be used to defend the lawsuit?

A Yes, I understand so.

Q Do you believe that they discovered in 1988 when you demanded that they take action that they had no 1982 plans and no defense to the lawsuit?

A I don't know that.

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[177]

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Q Okay. Referring to Exhibit R-3, which is a summary of the events related to the project, at page 7, will you please check item 29.

A 29, okay.

Q Okay, it refers to a meeting that was held in February of '87 and it states that a conclusion was reached which included that it was not possible to process the project before ARPE with the recommendation of the government

[178]

agencies that had been submitted.

Will you please explain or — well, explain what does it mean that the project could not be processed with those recommendations from the agencies?

A As I understand, this is that they were incomplete.

Q What were incomplete?

A Or that all the endorsements weren't there or that the endorsements that there were, if there were any, were preliminary and not final.

Q If such were the case, was ARPE able to certify the project or to pass review upon it?

A No, definitely not, because that's part of the necessary requirements that are needed to make a determination.

Q So according to this document, by February of 1987 ARPE could not pass review upon the project, referring to the case of PFZ?

A I understand that to be so.

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[184]

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Q So it would be reasonable for Mr. Rodriguez to assume that ARPE still had the drawings in August of 1988, would it not?

A Yes, it could be.

Q Until such time as he was advised that you did not have those drawings?

A As long as he wasn't notified by whom?

Q ARPE.

A Well, I repeat, in 1984 a letter was sent to the firm of Basura and Rodriguez for them to notify whether they're going to adhere to the conventional method or to the new certification law. And according to what I have knowledge of or what I know, they never answered anything so that no determination was made of what they were going to do.

As a matter of fact, I think the agency granted him a period of time but I don't know.

Q Handing you Exhibit R-12, is that the document to which you were just referring?

A Yes. That's the letter I'm referring to.

Q First — and this is a May 22, 1984 letter to Mr. Rodriguez from Mr. Maldonado?

A Yes, I understand that to be so.

Q In the first sentence he indicates that ARPE

[185]

has in its possession construction plans for urbanization works, is that correct?

A That's what it says there.

Q And that those were the construction plans for urbanization works submitted by Mr. Rodriguez, is that correct?

A I understand that's what it says there.

Q Is Mr. Maldonado a competent engineer?

A I have no elements on which to base that judgment, but I assume he was because he was the director of regional operations.

Q Is he someone who should be able to distinguish between anteproyecto and construction drawings for urbanization works?

A I think he should.

Q So if these plans which he is referring to were deficient in 1984, he should have been able to spot that, is that correct?

A Yes, he should have seen it.

Q Does he mention any deficiency in those plans which were submitted two years before?

A I don't see any.

Q Did ARPE advise the proponent of any deficiency in the construction drawings for urbanization works prior to

[186]

August of 1988?

A The general norm is if under the certifications law a plan is not complete, they will return it.

The problem that must have happened here is that since he never answered this letter, maybe ARPE was in doubt as to what method was going to be used to review the plan. And then come all the letters and all the meetings and time kept running.

* * *

[187]

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Q You are not aware of any, are you?

A Any what?

Q Any communications advising Basura and Rodriguez that the construction plans were inadequate.

A I personally have no knowledge other than that one which implies that the plans are defective. Because if it does not comply in May of '84, then the plan was incomplete and the case could not be seen. And that he knows.

Q Has there ever, to your knowledge, been a case in ARPE where it has taken more than six years to advise a proponent that his construction plans were inadequate?

A I don't know. I don't have any knowledge of a specific case. But in 1984 when that letter is written to him, they're telling him, assuming that those plans are those which they say they are. Then those plans had to be submitted after the date indicated there under the certifications act. And I don't know whether he did so.

Q Where does it say that in the letter?

A That says so in the letter. That he says that he has to indicate what method he's going to adhere to and he didn't answer.

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[191]

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Q In February of 1987 Mr. Marcano's memo indicates that a communication was supposed to be prepared to Basura and Rodriguez advising them of which further action was needed on the endorsements, is that correct?

A That's what the memo says.

Q And no such communication was ever sent, was it?

A I don't know if it was sent.

Q It was never brought to your attention?

A There was a letter which was prepared for Mota's signature. That letter on one occasion in a discussion, Marcano brought it up and that letter had Mota's signature and everything. It had been signed in February before Mota left. That was going to be sent but I asked him why it had not been sent and he said he didn't know.

Q Mr. Marcano told you this?

A Yes. Yes, he had it in his file.

[192]

Q He had it in his file?

A Yes.

Q When did he tell you this?

A Later on when the case was discussed, long after Mota had left.

Q Was it in the meetings in July of '88?

A No, I think it was before that. Long before that.

Q What instructions did you give him with respect to the letter?

A I asked him. I didn't give him any instructions. I told him to continue evaluating the case.

Q You didn't tell him to take any action with respect to that communication?

A I told him to evaluate the case and I think I asked him — that the letter was in an original, I asked him to give me the original and he gave it to my secretary to save it.

Q And this was the letter regarding agency endorsements?

A I think it was the letter that was spoken about in the memorandum.

Q His January 21st memorandum?

A Yes.

[193]

Q And there was a reference to a February '87 meeting with the Administrator? A February 1987 meeting?

A Yes. Number 29, more or less that.

Q The letter was actually prepared to that effect and you told him to give a copy to your secretary?

A Yes. That was in the file.

Q I'm sorry, I said a copy. The original was to be given to your secretary?

A Yes, and it was left there until the case was decided finally.

Q Once the case was decided finally what was supposed to happen to it?

A Nothing because it would have no relation to the case then because the case, if Marciano and his work group determined that the case was not in effect, then there was no reason for having sent the letter.

Q So your secretary was to hold on to the signed original until Marciano's group made their decision in the meetings that occurred in July of '88?

A Yes. No, he didn't sign it.

Q Mr. Rodriguez, what was your secretary's name?

A Alba Suarez.

Q Does she still work for ARPE?

A Yes.

[194]

Q Do you know who she works for currently?

A She's the Administrator's secretary.

Q Do you know what was ultimately done with this letter?

A No, I think it stayed there. It should still be there.

Q Where do you believe it would be right now?

A It may still be in the secretary's possession.

Q She was told to hold on to it?

A No, she just filed it. Possibly when these people gave me a document or copies of these we prepared a file and it should be among the things that were given to me on Vasia Talega. It should be in there.

Q Given to you by whom?

A The letter? The persons when they discussed things sometimes they brought me some documents or something or some history. Then I would say let's make a file on Vasia Talega and we'd put it in there.

Q And your secretary kept that file?

A I understand that to be so.

Q Where are the actual drawers or file cabinets that hold this file?

A It should be in the Administrator's office.

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[196]

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Q In relation to that letter that we were just talking about that came up in the memorandum of January 21 of 1988, who ordered that that letter be prepared?

A That should be known by Marcano. I understand that that letter was part of the instructions that were laid out in the memorandum. Mota gave him instructions to do so.

[197]

Q Do you know if that letter was signed by Mr. Mota?

A I did not see it signed.

Q Do you know if it was sent or...

A I understand it wasn't. I don't know.

Q Did Basura and Rodriguez ever request to see the plans that ARPE reviewed and on which they based their denial or on which they made their conclusion that the project was no longer in effect?

A I don't know.

Q Did he ever request of you to see those plans that were reviewed?

A No, not me.

Q In relation to Exhibit R-12, will you please look at it, the Spanish version?

A Yes.

Q Do you know if this letter was made for each file that was at ARPE referring to the documents in that file, or was it a format letter?

A Whether it was made for this case or for other cases?

Q Whether this letter was prepared individually for each case based on the documents that were in the file?

[198]

A I think it was made for all the cases that were pending when the change came.

Q Okay, but looking at this letter, could you say if this is a letter prepared only for this case or is this letter a format?

A It could be a format because here it has, for example, Dear sir, and then it would just put the name. It may have been that they prepared a form letter and it was sent to everybody that informed construction plans pending revision. That's what I can infer.

Q Okay, so based on this...

A I don't have the exact facts.

Q So based on this letter you could not say or you could not rely on the information that the drawings were submitted for final review and that they were complete?

MR. RICHICHI: I'm going to object to this. I don't think he's competent to testify to that.

MS. ROJAS: Objection noted.

BY MS. ROJAS:

Q Please answer.

A Can you repeat the question, please?

Q Okay. Suppose if this were a format, then you could not say whether the file had the complete drawings that were required?

[199]

A Well, when he sends this letter I understand that he must comply — that the person should have answered if he's going to adhere to the conventional method or to the method under the certification law.

Q No, but the question was could you rely on let's say the first paragraphs of this letter to — I'll strike that.

A What happens is that the method under the certification act is a method that if you have a case that is complete with all the documents, in two or three days the case can be approved.

Q My question — okay. Based on this letter of 1984 could you say that the file and that the drawings submitted were complete, based only on this letter?

A No, just on that no.

Q Okay. I just have one question.

Has there been any case of such big, of this type where the consultant never inquires about what's going on it after — for four years?

A Those who submit cases to ARPE, almost every day, or at least every month they continue asking for their case. And when they don't do it they have persons whom we call the pushers, who continue lobbying and asking about the cases. And they answer the people. And almost all engineering

[200]

firms have those people.

Q So that would raise doubts that a consultant wait for four years to see what's going on with his case?

MR. RICHICHI: Raise doubts as to what?

THE DEPONENT: Yes. Definitely yes.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.	}	CIVIL NO. 87-01915 (HL)
Plaintiff,		
vs.		
RENE ALBERTO RODRIGUEZ, et al.		
Defendants.		

EXCERPTS FROM THE DEPOSITION OF ELBA
SUAREZ ORTIZ (SEPTEMBER 12, 1989)

[28]

* * *

Q You mentioned that there was a special cases file prepared for Vacia Talega, is that correct?

A Yes, there's a special cases file in which Vacia Talega and other cases are in.

Q About how many other cases do you think are in that

[29]

special cases file?

A Perhaps 12, 15.

Q And who decides whether a project should be placed in the special cases file?

A Well, sometimes it's even decided by me, because when I see that a case goes on a couple of months and I feel it's going to take a long time, I say, "Let's put it in the special cases."

Q Where is that special cases file located?

A There's a file room which is full of files and the photocopying machine, and there are a lot of file cabinets, 10 or 12. And in one of those drawers is the special cases.

Q Where is that file room in relation to where your desk is located?

A It's almost in front of my desk. My desk is here. In front of me there's a door.

Q And where is it located in relation to the Administrator's office?

A Well, there's the Administrator's office, and in front of his office is my desk. And in front of my desk is where that room is, which is the photocopying machine, the files, and all the materials and the files for the Administrator and the Deputy Administrator.

[30]

Q How many steps away from your desk do you think it is to the file room?

A Well, let's put it in feet. Let's say 10 or 15 feet from my desk.

Q Is that file room kept locked?

A In the afternoon, it's kept locked under key.

Q Who has a key to the room?

A The Administrator has a key, the two secretaries of the Administrator, and the secretary to the Deputy Administrator.

* * *

[31]

Q So as far as you know, the only people who have a key to the file room are the Administrator, two secretaries to the Administrator, and the secretary to the Deputy Administrator, is that correct?

A Yes.

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No technician or anybody that's not from our office will touch those files for anything.

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Q So this would be simply correspondence, is that

[36]

correct?

A Yes.

* * *

IN THE UNITED STATES DISTRICT COURT
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et al.		
Defendants.		

EXCERPTS FROM THE DEPOSITION OF JORGE
COLON (SEPTEMBER 12, 1989)

[34]

Q This document marked Exhibit C-1 appears on its face to be a December 16, 1988 letter on ARPE stationary, is that correct?

A Yes.

Q And it also appears on its face to be a letter signed by administrator of ARPE Rene Rodriguez to Luis Rodriguez, and Jose Novas, is that correct?

A That's correct.

Q I'd like to address direct your attention to the numbered items 1 through 19 that appear on page 1 and 2 of the December 16, 1988 letter.

Do you see where I am looking?

A Yes.

Q And have you had a chance to read through those 19 items which correspond to 19 sheets?

A Yes.

Q And can you tell me by looking at those 19 items whether they relate to anteproyecto or construction plans for urbanization works?

A It refers more to construction plans for structures, for buildings.

Q So, that would be anteproyecto, is that correct?

A Perhaps the set of plans have a little more

[35]

information than a anteproyecto.

Q Have you ever seen this letter before today, Mr. Colon?

A I think I've seen it.

Q Do you recall the circumstances under which you saw this letter previously?

A I think that when I was coordinating the copies of documents, that had been requested for production to the attorneys. I think this is one of the letters I saw in those documents.

Q Do you recall any other occasions on which you saw this letter?

A No, I don't recall.

Q I would like to clarify, are you saying you don't recall if you've ever seen this document before or that you have never seen this document before?

A I previously stated that when we were looking for documents to be presented at the production of documents, I had an opportunity to see this document and on some other occasion, no.

Q I apologize, the question wasn't very clear.

I meant to ask you other than at the document production. Is it that you don't recall seeing the letter before or that you never saw the letter before

[36]

that?

A Aside from that, no.

Q Mr. Colon, were you aware of the fact that this letter was being prepared by ARPE in the reconsideration -- in response to the request for reconsideration?

A Could you repeat the question, please?

Q Mr. Colon own, were you aware that a letter such as this was being prepared by ARPE?

A No.

Q Did anyone ever solicit your view regarding the reconsideration which is the subject of this letter?

A No.

Q Did anyone ever ask to see any files or plans that you might have with regard to the drafting of this letter?

A No.

Q Did anyone ask you to review this letter before it was signed by Administrator Rodriguez?

A No.

Q Did you at any time discuss this letter with Attorney Chiques?

A No.

* * *

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* * *

Q Did the meeting take place in February?

A I think it was in February. To be the most exact it would be the beginning of 1987. I don't want to give the impression that it was exactly in February.

Q What was the purpose of that meeting?

A The purpose of the meeting was to discuss the comments that they had in regards to that project, check and make a comparison between the applicable regulations in force, and I understand to prepare a final complete picture to discuss it with the administrator.

Q Do you recall if you were asked to bring any documents or plans to that meeting?

A No. I specifically wasn't.

Q You were not asked to bring anything?

A No.

Q Did you bring any documents or plans to the meeting on your own initiative?

A Yes, on my own initiative I brought with me a copy of a report approving the development, the preliminary development of the project approved I believe in 1981.

* * *

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Q Was Rene Rodriguez at this meeting?

A I think not.

Q Were you asked to present your view about the project at this meeting?

A At that meeting we discussed the project in general. Then, some questions that arose were answered, concerning the preliminary development plan which had been approved.

Questions concerning the method in which projects had been filed in the previous years. And we discussed the projects in general.

Q Was any question raised whether the project was still in effect?

A That was one of the points that was discussed.

(Whereupon, Mr. Richichi left the deposition room.)

Q Mr. Colon, you described in general the subject of the meeting.

Were you asked among others to give your view about the issues that were being addressed?

[47]

A Yes, we all gave our points of view.

Q Could you state for the record what your viewpoint was?

MR. BLANCO: I have a problem with that question.

MS. SZMUSZKOVICZ: Which is?

MR. BLANCO: I think you're getting into the decision making process of the agency. I have no problem with what you've asked so far, and I have no problem with asking what was the final result as to what each individual viewpoint was.

I have a problem with that because you're getting into the internal decision-making process of the agency. And I'm going to object to that. And I'm going to instruct the witness not to answer.

MR. NOVAS: She's not asking about the other individuals. She's just asking about what the other individual points of view were.

MR. BLANCO: The objection is just as good to his as to what anybody else's is. If you want the official conclusion reached, I have no problem with that.

MS. SZMUSZKOVICZ: Let's move to another topic for now.

Q Do you recall whether any decisions were reached as a result of this meeting?

[48]

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A As a result of that meeting, no decision was made.

* * *

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* * *

Q Is it an acceptable practice for a proponent to submit both construction drawings and anteproyecto simultaneously?

A It can be considered a practice once the preliminary development has been approved. And that preliminary approval allows it to be submitted that way.

Q And was that so in this case?

A In this case the preliminary development

[59]

* * *

approved in 1981 required construction plans for urbanization works for projects for the whole project.

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Q And now in looking at the February 22, 1982 letter, Exhibit C-5, and Exhibit 1, which is the December 16, 1988 memorandum, do you have those two letters in front of you?

A Yes, I have them.

Q I'd like to direct your attention in the February 22, 1982 letter to the last paragraph of the letter.

Is it correct that Engineer Luis Rodriguez is indicating that sheet 9 of the construction plans submitted refers to earth moving works?

A It's correct that the letter says that sheet

[71]

number 9 refers to the earth movement.

Q And now referring to the December 16, 1988 letter, what does sheet number 9 consist of according to this letter?

A The memoranda of December 16, 1988 which describes the sets of sheets which make up the plan, says that sheet number 9 refers to elevation.

Q And is it fair to conclude that elevation would not be confused with earth moving?

A No, it cannot be confused with it.

Q Isn't it a fact that elevation refers to structures?

A Normally, it refers to structures, to the height of each story of a building or the height of the building, but on occasions the level that is given to land is sometimes referred to as elevation.

Q I believe you testified that it would not be reasonable to confuse a sheet illustrating elevation with a sheet illustrating earth moving works, is that correct?

A That's correct. It cannot be confused.

Q And thus in looking in these two letters it would be fair to conclude that the two authors are referring to two different sets of plans?

A It's possible.

* * *

[76]

Q After you sent the March 24, 1982 letter to Luis Rodriguez returning the anteproyecto and indicating that the construction drawings were being referred to Carolina, did you ever see those construction drawings again?

A Never.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

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Plaintiff,		
vs.		
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Defendants.		

EXCERPTS FROM THE DEPOSITION OF PEDRO
JUAN SANCHEZ (SEPTEMBER 13, 1989)

[16]

Q If I had two sets of plans with me and one was construction plans for urbanization work and one was anteproyecto, would you be able to tell easily the difference between the two?

A Yes.

Q How long would it take you to look at it and say this is the construction plan and this is the anteproyecto?

A I couldn't say the time. It depends on the documents that are presented.

Q Would it take a matter of minutes or a number of days or something in between?

A I would say it doesn't take a long time.

Q Would you anticipate that any engineer who works for ARPE would be able to tell the difference between construction plans and anteproyecto?

A Someone other than my self?

Q Yes?

A Of course. And there are people that work in that, technicians that work in review of plans.

Q And they certainly would know the difference between the two?

[17]

A Yes.

Q Would you expect that the administrator of ARPE would be able to tell the difference between the two?

A I understand so.

Q Let me just ask if you know a person named Rene Rodriguez --

A Yes.

Q (Continuing) -- who was previously the administrator of APRE, but no longer works there?

A That's correct.

Q And in your opinion, is he a reasonably competent engineer?

A Yes.

Q And you think that he would be able to distinguish easily between construction plans for urbanization works and anteproyecto?

A Yes.

Q And do you know a gentleman named Cruz Marciano Rubles?

A Yes.

Q In your opinion, is he a reasonably competent engineer?

A Yes.

[18]

Q And do you think he would easy be able to distinguish between the two?

A Yes.

Q And do you know an individual named Virgilio Gautier?

A Yes, also.

Q And do you think that he would easily be able to distinguish between the two types of plans?

A Yes.

Q And are you familiar with the gentlemen by the name of Ramon Ayala?

A Yes.

Q And would he be able to distinguish easily between the two?

A Yes.

Q Are you familiar with a gentlemen named Jorge Colon?

A Yes.

Q Would he be able to easily distinguish between the two types of plans?

A Yes.

[20]

* * *

Q Did I understand correctly that there was an occasion in which you met in the main office and an occasion that you met in the Carolina office to look at these plans or was there just one meeting?

A I don't know that there was a meeting in Carolina. I know that that was in my office.

Q What was the purpose of the meeting?

A To determine if those plans constituted

[21]

construction plans or not because they were being presented. They had already been presented.

Q When did this meeting take place?

A I don't recall, but but it was in 1987, around there.

Q Based upon that meeting would you expect that Carmen Chiques would be able to distinguish between construction plans for urbanization works and anteproyecto?

A Well, those plans had already been reviewed, by the regional operations area which was the custodian of the case.

It had already been consulted with the technicians and the persons who made up the office whose responsibility it was to review the plans and in this case they met with me and they requested my opinion as an advisor.

Q And were those plans construction drawings for urbanization works or anteproyecto?

A To me they were not construction plans for urbanization works.

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Q This meeting, you said you recall that it was sometime in 1987. Was it before the lawsuit was filed?

A No, it was already filed.

Q You stated earlier that to you the plans were not construction plans for urbanization works.

A Well, they had already determined that, and they came to me. I was also in agreement, and there was a consensus that they were not plans.

Q Were they anteproyecto?

A It had something of an anteproyecto. It was a combination.

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Q What documents were examined?

A I understand the regional operations area examined the plans that were available and the report approving the preliminary development which is the document that authorizes the preparation of the final construction plans for urbanization works.

Q Did you participate in any of these meetings?

A Yes.

Q Was one of the meetings the one in which you mentioned earlier in which plans were reviewed to determine whether or not they were construction plans or was that separate?

A There was a meeting to determine whether they were in effect or not.

Q Who participated in those meetings?

A I participated, and there were others. Engineer Ayala, Jorge Colon, Cruz Marcano Robles, Engineer Gautier, Attorney Chiques, that I can recall.

Q Were there any documents at those meetings?

A The plans, the preliminary development, the report approving the preliminary development.

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Q Do you recall who led the meeting?

A I did. Because the administrator was not available, and we met in my office, and we informed him.

Q Whose idea was it to have the meeting?

A The administrator.

Q What instructions did he give you about that meeting?

A That the documents available be examined and to get a report from what the regional operations area had reported and to see if in view of those documents the project was in effect or not.

Q Did he state his view on that matter to you?

A The opinion in regards to what?

Q Mr. Rodriguez's opinion regarding whether the project was in effect.

A No, there was a consensus among all of us

[41]

including him and he was given the report or he was informed of it.

Q Based on what you knew about the project, why do you think that administrator Rodriguez asked you to have this meeting in the summer of 1988?

A I don't know, but I understand it to be as part of the examination of the whole project that was being made, the handling or the processing.

Q Would you consider based on your experience over the years at the Planning Board of ARPE that a project that had been submitted in 1982 would normally be reviewed 6 years later to determine whether or not it was still in effect?

A No. I would say no, but it depends on the plans because what was found in the copies of the plans and the documents, it was that they were advance copies, advance copies of the construction plans.

Q I'm not sure I understand. What advanced copies of construction plans?

A Based on the preliminary development plan approved, you should prepare some construction plans, final construction plans for which a resolution is issued and the plans are sealed and everything and signed by the agency and that constitutes the construction plans and

[42]

includes the most minute detail of what's going to be constructed with the structure and the infrastructure with the plans of the agencies involved duly signed and stamped. And with the endorsement of all the agencies that have to do with the case, and final endorsements.

Notwithstanding, you can prepare some advanced copies of plans, at least that was the practice. And it was allowed by law to submit advance copies for comments from ARPE. But it is the responsibility of proponents to submit complete plans within the effectiveness of the preliminary development.

Q And in the usual case when a proponent would present advanced plans for comments, how would the comments go back and forth between ARPE and the proponents?

A In other words, the custom is that the proponents would submit advance copies, but they kept in touch with the technicians who have the cases assigned to them and they add until the plans are completed within the effectiveness and then they're considered final plans and they're approved.

But the advanced copies, the agency is not committed with the advanced copies, nor with the comments that a technician may make concerning the

[43]

advanced copies, at least the applicable regulation at that time, which was approximate 139.

Q At that time meaning what time?

A When the construction, when the advanced construction plans are filed.

Q In this case, meaning in 1982?

A Exactly. That later changed in 1984.

Q With the certification law?

A That's correct.

Q Let me see if I understand what you said. In brief summary, have a proponent to submit advanced copies and may have some give and take with the technicians. But it was encumbant upon the proponents to submit final plans?

A Yes, correct.

Q Within what time period?

A Within a year, within the effectiveness that establishes the approval of the preliminary plans.

* * *

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Q Now, you mentioned the name of Lionel Motta earlier. He's a former administrator of ARPE?

A It's that we've gone back and forth, and I get a little confused because of the years.

Q He was also deposed in this case a number of

[45]

weeks ago. And we asked him some very similar questions about how the process works, and he testified that when a proponent submitted plans, construction plans sometimes incomplete, as long as it was within the one year period.

And he acknowledged that there could be some back and forth between ARPE and the proponents just as you did. Now, when Mr. Motta testified to that fact, was he wrong?

A Well, the construction plans have to be completed within the year or the period of effectiveness. They have to be complete.

Q And that was true in every case of which you're aware?

A Yes.

Q And that was true prior to the certification law?

A Yes.

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* * *

Q And can we agree that that is the only reasonable interpretation of this letter?

A Yes, that is what it says that he's submitting construction plans. But in another part of the letter, it also says advance copies.

Q What paragraph are you referring to now?

A In the last paragraph of the first page it says "It has not been possible to present the final construction plans." And if they're not final, well,

[50]

they're advance.

Q What would ARPE do upon receipt of an advance plan like this in 1982?

A When you receive advance copies of construction plans, which does not include the endorsements of the agencies involved, according to the law and regulations in force, the agency was not obliged to consider them seriously.

It could make comments, but it was not even obligated to do that. The law provided that you could submit advance copies, the agency could make comments, but always within the effectiveness of the preliminary development.

Q That was the law in 1982 prior to certification as you understand it?

A Yes, resolution P 139 of the Board, which subsequently when ARPE was created it passed on to ARPE.

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Q There was a regional director that had custody of the plans at this time?

A Well, these plans were at the central office.

Q So, who would have had custody of the plans?

A In the office of construction plans for urbanization works.

Q And who was the director of that office?

A Engineer Cruz Marcano and Engineer Jorge Colon directly. Engineer Cruz Marcano was the assistant administrator for the regional operations area.

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Q And what was the status of the project at that time?

A The plans were in the area of construction plans for urbanization works, whatever they were, without being reviewed. They had not been -- no action had been taken on them.

Q Was that unusual given that they had been submitted in 1982 and it was now 1986?

A If they were considered to be advance copies, well, the agency was not obliged to review them.

Q So, what was the conclusion reached at these meetings as to the status of the project?

A The meetings at which the effectiveness of

[]

the program was never spoken of.

I never heard speak of the effectiveness, whether they were in the effect or not. It had been said that they had not, no action had been taken on them.

Q Do you recall the explanation of why no action had been taken?

A I don't recall, but it was directed or concentrated or focused on the agency endorsements.

Q And who would have been responsible for reporting on the status of the project at this meeting

A The area of regional operations, Engineer Marcano.

* * *

[70]

* * *

Q I believe you stated previously that letters were circulated to the different agencies in order to obtain their endorsements, is that correct?

A Yes, I understand so.

I understand that letters were circulated to the agencies in the stage of 1986 when Lionel Motta was there as the administrator. And subsequently, later with administrator Rene Rodriguez also.

Q Rene Rodriguez also sought to obtain endorsements from the other agencies?

A That's correct.

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Q Are you aware of other cases in which the administrator sought to obtain endorsements in this manner and indeed held interagency meetings regarding the endorsements?

A Well, in the time that the plans were reviewed, it was up to the proponents to obtain the endorsements from the agencies.

Q So, it would be extraordinarily for the administrator to seek those endorsements, isn't that correct?

* * *

[74]

Q I'd like to direct your attention to the second to the last paragraph. It states, does it not, for the purpose of the expediting the endorsements pending and in view of the importance of the project, we have decided to hold a new meeting," is that correct?

A Yes.

Q And that meeting was scheduled for September 9 in Mr. Motta's office, is that correct?

A That's correct.

Q And he, through this letter, is inviting Mr. Rivera Cabrera to attend the meeting; is that correct?

A That's correct.

Q Have you ever seen this letter before today?

A Not really, no.

Q To the best of your knowledge, is anything in this letter wrong or inaccurate?

A I see nothing wrong with what he says. That is what he understands.

Q And does this letter accurately reflect your recollection of the status of the Vacia Talega project at this time in 1986?

A In this letter he understands that it's in effect.

* * *

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Q Do I understand you correctly that as of today, September 13, 1989, your opinion is that the project did not have effect in 1986 even though at the time it was believed that the project had effect?

A Yes, exactly.

Q And you have stated that the basis for that opinion derives from meetings that took place in either 1987 or 1988?

[78]

A That's correct.

Q At which documents were reviewed?

A And it was determined that it was not in effect.

Q What I'd like to know is what are the facts that demonstrate that the project was not in effect as of 1986?

A That advance copies were submitted in 1982 and no final plans were submitted.

Q And no one knew that fact in 1986, is that what you're telling me?

A That's correct.

Q How can that be possible?

What facts changed from 1986 to 1988 that makes it possible for you to make the statement that you've just made?

A Well, the meetings that occurred and were the result of the suit.

Q That is exactly right, isn't it?

A Yes.

Q The only facts that changed between 1986 and today were that meetings were held in 1988 at ARPE and a lawsuit was filed in this matter, is that correct?

A That's correct. Because in 1986 when these

[79]

meetings occurred, I never heard speak of effectiveness. I never heard speak of the effectiveness of the project, or whether it was in effect or not.

Q I just want to be sure I have the sequence of events correct. In 1986, this letter was sent from Lionel Motta to Mr. Rivera Cabrera?

A Correct, yes. I've seen it.

Q Informing him of the status of the project?

A Yes.

Q And there's no question about whether the project was in effect at that time?

A That's correct.

Q In 1987, PFZ Properties filed a lawsuit against ARPE?

A That's correct.

Q Concerning the Vacía Talega project and the fact that the plans had not been approved?

A That's correct.

Q And later in 1987 or 1988, there were meetings held at ARPE to discuss whether the project was in effect and it was determined that the project no longer had effect?

A That's correct.

Q And that, in fact, it had lost effectiveness

[80]

in February of 1982, is that correct?

A That's correct.

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Q So, there may have been a different letter that was to be sent to the proponents and another one to the other interested agencies?

A Yes.

Q Why did those come up at the 1988 meetings?

A As I said, all the documents were being examined. And they spoke of those letters.

Q They spoke of the letters --

A In the meetings everything that was informative was being looked for. And they spoke of the meetings that had been held by Engineer Motta and the results of the meeting, and the instructions that he gave in regards to the status of the plans or the action to be taken on the plans.

Q Do you recall what those instructions were?

A I don't recall well the contents, but it was informing the proponents concerning the plans, something

[86]

about the endorsements, and perhaps granting an additional period.

Q You mentioned that the letters to the proponents and the agencies were discussed in the 1988 meeting, that people spoke of them.

Did they actually have copies of the letter?

A I didn't see them.

Q Do you recall who was discussing the letter at the 1988 meeting?

A Engineer Colon, engineer Marciano, Engineer Ayala, who were from the regional operations area. And from the division of construction plans for urbanization works, who were the ones that had the project under their consideration.

Q And what did Mr. Marciano say about the letter?

A I don't recall, but I do know that it was mentioned. I don't know who mentioned that these letters had been authorized and that it had been written, but that they had not been sent.

[87]

* * *

Q When the letters were discussed, was there any concern expressed about the fact that they had not been sent?

A Well, the normal ones of a letter that is prepared and it's not sent, but there was no expression that I could see of surprise, that it should have been sent and were not sent.

Q You mentioned just the normal problems of a letter that should have been --

A What I mean to say is that everybody asks themselves why the letter had not been sent, but I don't recall that a reason was given.

Q Because it was understood that administrator Motta wanted the letter sent, is that correct?

A Well, he gave an instruction that it be sent. Therefore, I understand yes.

Q Who made the decision not to send it?

A The letter was supposed to be prepared by the regional operations area.

* * *

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* * *

Q You mentioned that it would have been the assistant administrator for regional operations who was responsible for sending or not sending the letter?

A Well, at least the instructions were that he should prepare it, that I was aware of.

Q Who was the assistant administrator at that time who would have been responsible for preparing the letter?

A Engineer Marciano.

* * *

[90]

Q And do you recall Attorney Chiques discussing the implications of the letter at all?

A It was said that the letter contained an additional period and this was important. And that was an important fact.

Q Why was that important?

A Because it had to do with whether the plans were still legal under the consideration of ARPE or not or if the effect of granting an additional period of time.

If you will allow me, I would like to say that I have not seen these letters. They were discussed when they were being discussed, but I can't indicate whether additional time was granted. But I am under the impression that it was.

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You've had an opportunity to review the letter?

A That's correct.

Q And can we agree that on its face it appears to be a February 26, 1987 letter on ARPE stationery from Lionel Motta I to Engineer Luis Basora of Basora and Rodriguez, is that correct?

A That's correct.

Q And the subject is the Vacia Talega project?

A That's correct.

Q And this letter is a summary of the status of the project in response to Mr. Luis Rodriguez's January 27, 1986 letter which we discussed earlier, is that correct?

A That's correct.

Q And in the third to the last paragraph, Mr. Motta informs Mr. Basora that the agency is granting the proponents one year from the date of this letter to submit final construction plans for urbanization works as provided by planning regulation number 12, is that correct?

A Yes.

Q And based upon your understanding from the

[92]

1988 meetings and the testimony that you've just given, and understanding that you stated that you hadn't previously seen the letter, does this appear to be the letter that you were describing that Lionel Motta asked to be sent, but that was never sent?

A Yes, I understand that to be so. This is the first time that I see it.

Q So, Mr. Motta intended to grant the proponents one year from February 27, 1987 to submit final construction plans for urbanization works.

A That's correct, an extension of time.

Q Do you know whether Rene Rodriguez made the decision that this letter should not be sent?

A I don't know. I don't know who decided.

Q Do you know Mr. Rodriguez's view as to this letter?

A As far as I know, I became aware of it later. He asked why it had not been sent.

Q He asked who, why it had not been sent?

A At least he stated at a meeting in which I was present.

Q So, Mr. Rodriguez inquired as to why the letter had not been sent during a meeting at which you were present?

[93]

A Yes. When the letter came out that the preparation of this letter had been authorized, he asked why it had not been sent.

Q And do you recall when that meeting was?

A No, I don't recall the date. We were meeting frequently. Every time we find a document it's a meeting.

But I did know the letter, but I had not seen it.

Q But the meeting at which it was mentioned and I understand there are possible meetings, was it the same meeting that took place in 1988 to discuss the project or was it prior to that time?

A I would say it was before.

Q Do you recall who provided the answer to Mr. Rodriguez's question about why the letter hadn't been sent?

A No, I don't recall.

Q But he indicated concern that it had not been sent?

A Or at least he asked why it had not been sent.

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Q The administrator made the decision, and he had the authority to make the decision, is that correct?

A That was his decision. The law establishes, but I as an administrator can make a decision.

* * *

[100]

Q And can we agree that on its face, it appears to be an December 16, 1988 letter on ARPE stationery signed by administrator Rene Rodriguez and addressed to Engineer Luis Rodriguez and Attorney Jose Luis Novas?

A That is correct.

Q Have you ever seen this letter before today?

A I know that it was being prepared.

Q And were you asked to review it before it was sent out?

A No, I don't recall.

Or at least when I was consulted was at the time that I was consulted regarding the plans. I was in my office, and I was consulted in regards to the plans which are described.

Q Described in the letter?

A Yes.

Q And did you see those plans that were used as the basis for this letter?

A Yes, that's correct.

Q When was that?

A But, of course, it had to be prior to December 16 and prior to the 15th because I went on vacation because I was going to retire.

[101]

As of that date I don't know if it was from the 11th, but to the end of December and by January I was already outside. But Attorney Chiques did consult me in the presence of Engineer Ayala. I remember he was there from the office of constructions plans for urbanization works in the operations area. And I don't recall who else was there.

Q They came to your office with a draft of this letter and the plans?

A No, they didn't have the draft yet. She requested that the plans be examined and be told what they contained and to what type of plans they corresponded to.

Q What did you tell her when she asked that question?

A After the plans were reviewed, plans which had already been reviewed by the regional operations area, it was concluded and I was in agreement that it was not construction plans for urbanization works.

It had to be precise that it was not the plans required by the preliminary development plans or construction plans for this type of project.

MR. BLANCO: No, approved for this project.

A Approved for this project.

* * *

[103]

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Q And I believe we discussed earlier that on the last page of Luis Rodriguez's letter, he requested advance approval of the general earth moving work as presented on sheet number 9 of the construction plans that he had submitted that day.

A Yes, that's correct.

Q And these are the only construction plans for urbanization works that you're aware of that were submitted with regard to this project, is that correct?

A That's correct.

Q So, the meetings that were held in 1988 were addressed to were whether those construction plans met the requirements of the agency?

A That's correct.

Q And the reconsideration would have been based up-
on those same construction plans?

A That's correct.

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[105]

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Q You mentioned that Attorney Chiques and a num-
ber of other people were in your office discussing the Decem-
ber 16, 1988 letter before it had been drafted?

A And they had already discussed the plans and

[106]

reviewed the plans completely and the whole file. Engineer
Jorge Colon, Ayala and the regional operations area.

Q And they brought with them a set of plans which
Attorney Chiques asked you to take a look at?

A These plans which were the only ones which were
presented for examination.

Q Do you remember anything about those plans?

A The ones that were shown to me you're referring to?

Q Yes.

A Yes. The title which was preliminary project plans,
for block number 2 it had some details on topography, the
location of the buildings of block 2, the subdivision to lots
and details of the buildings of the condominiums.

Q Are you aware of any other steps that were taken to
gather information in orders to write this December 16, 1988
letter?

A Other steps like what? I don't understand well.

Q Based upon documents that have been produced by
ARPE, I'll represent to you that information was solicited
from other agencies regarding the project

[107]

after the reconsideration was requested and before this letter
was sent.

Were you aware that such information was solicited
from agencies other than ARPE?

A Yes, I understand yes.

I recall there was a meeting, and it was decided to consult
the agencies and Engineer Cruz Marcano was entrusted with
this.

Q Why would you need to request information from
other agencies to respond to the request for reconsideration?

A I don't recall if it was precisely for this. I don't recall
precisely if it was for this answer, but we did want to know the
attempts made by the proponents concerning endorsements
for the final plans.

Q And how is that relevant to the ARPE determination
that the project was no longer in effect?

A Because since these were not final construction
plans, and not having been submitted within the period grant-
ed for final determination the reason that the proponents
were alleging that they had had difficulties with the agency in
obtaining the final endorsements.

And at this stage, they wanted to know

[108]

what attempts they made with the agencies.

Q But those endorsements and the question of whether
or not there were agency endorsements are not mentioned in
the December 16, 1988 letter, are they?

A Yes, that's correct. They're not mentioned.

Q So, they weren't part of the basis for the denial of reconsideration, is that correct?

A It's not expressly indicated in the letter, but it appears construction and in quotations.

Concerning the endorsements, if you'll allow me to make a clarification, the agency endorsements are required in the different stages of the project, location consultation and it has a connotation for that stage and the stage of preliminary development also.

And those are preliminary endorsements in which the agencies express themselves and says okay for example, there's electrical energy capacity, or drinking water capacity or if there aren't, then it makes a request for works. And those works have to be contained in the final construction plans duly reviewed by their technicians that have the expertise and duly sealed and approved.

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* * *

Q Based upon documents that have been produced and previous testimony, this August 2, 1988 letter along with another August 2, 1988 letter signed by Virgilio Gautier, was the subject of a request for reconsideration which was sent to ARPE by Luis Rodriguez?

A That's correct.

Q And the December 16, 1988 letter that we looked at a few moments ago that was signed by Rene Rodriguez and sent to Luis Rodriguez denying that reconsideration was taken into account, this Cruz Marciano letter of August 2, 1988, is that correct?

A In part, yes.

Q And from preparing the denial for reconsideration, you were shown certain plans entitled

[112]

preliminary project plans in your office?

A Yes, correct.

Q And is it your understanding that those are the same plans that were returned by Mr. Marciano under cover of his August 2, 1988 letter?

A The only plans that I've seen and that was the only opportunity I've seen them, the only plans I've seen and it was incumbent upon them to review all that.

Q So, you would have only known if those were the same plans that were returned by Cruz Marciano if Attorney Chiques who showed you the plans told you that those were the same?

A That's correct.

Q And did she tell you that they were the same plans?

A That they were the only plans available for examination.

Q Those were the only plans that were available for examination, is that correct?

A For me those were the only ones brought to me and the only ones I saw.

Q Was it your understanding that the plans that were shown to you were the plans that Mr. Marciano had found to be insufficient?

[113]

A Well, I understand that to be true.

Q And those were the same plans that Engineer Rene Rodriguez found to be insufficient in his reconsideration as reflected in his December letter?

A Yes, also.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.	}	CIVIL NO. 87-01915 (HL)
Plaintiff,		
vs.		
RENE ALBERTO RODRIGUEZ,		
et al.		
Defendants.		

EXCERPTS FROM THE DEPOSITION OF CRUZ
- MARCANO-ROBLES (SEPTEMBER 14, 1989)

[248]

* * *

Q We had spoken previously about situations in which a proponent submits construction drawings for urbanization works to ARPE for consideration.

Do you recall generally that we had discussed that?

A Yes, we spoke of plans.

Q Generally speaking, it's my understanding that in the communication back and forth between the proponents and the ARPE technician and there's communication between the drawings that are submitted, is that correct?

A Generally, the proponent visits the office following up on his case. There is communication about the drawings submitted.

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Q Are you referring to some specific instance or just generally speaking?

A No. What happens is that generally the proponents immediately after submitting their projects so as to accelerate the process and obtain advance information concerning deficiencies which might exist, contacts the technicians and they will give him advance warning or advance notice, so information so that they can go working and obtaining same.

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[255]

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Q How would you distinguish the approved projects from the Vacia Talega project?

A That the approved projects are the ones that had been notified to the proponents that his proposal, his project, his plans, all the documents, are in compliance with the law and you may continue on to the other stages. And it is ready to begin construction.

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[259]

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Q Was the Vacia Talega case evaluated under the post certification procedures or the precertification procedures?

A Precertification.

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[263]

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Q You worked for Rene Rodriguez for a long time, did you not?

A Yes.

Q Did you find him generally to be a truthful man?

A Well, he's a professional.

Q Is that a yes or no?

A Yes.

* * *

[266]

Q But back in 1987 a letter had been prepared and had been shown to you, it's reasonable to assume that the next day you would have recalled seeing such a letter; is that correct?

A Not necessarily.

Q Is there anything that would refresh your recollection as to whether such a letter was prepared?

A Not that I can think of or not that I believe.

Q Do you recall whether you ever told Rene Rodriguez that such a letter had been prepared?

A I don't recall.

Q So, you can't say one way or the other whether you would have told Rene Rodriguez back in 1987 that such a letter had been prepared?

A I don't recall.

Q Do you recall ever having any discussions with Rene Rodriguez regarding a letter which was prepared as a result of that February 1987 meeting regarding Vacia Talega?

A No, I don't recall.

Q You recall no such conversations?

A No, I don't recall.

* * *

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* * *

Q Are you aware of any special case files that are kept this filing room?

A That I know of, no.

Q Are you aware of any documents with respect to the Vacia Talega project which were kept in a file folder in that room?

A I couldn't state it, but they may have been because it was an important case.

Q What do you mean important case?

A That it's frequently discussed, that someone will ask for it or that there's communication to the administrator.

Q From whom?

A From the proponents, from the other agencies, from anybody.

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[275]

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Q Was exhibit CM-13 in the file for the Vacia Talega case?

A I've never seen it.

Q You've never seen it in that file?

A No, never.

Q Did you ever discuss this February 6, 1987 document with Rene Rodriguez?

A I don't recall. I had never seen the document.

Q You're saying you had never seen the document or you don't recall seeing the document?

A I don't recall having seen it.

Q Is it possible you saw it in 1987 and you just can't recall now?

A I don't recall having seen it.

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[278]

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Q Do you recall ever having any disagreements with Mr. Rodriguez about how matters related to Vacia Talega projects should be handled?

A No.

Q Was the responsibility for the decisions that were made with respect to the Vacia Talega project yours?

A At what time?

Q In July of 1988.

A I was part of the agency.

Q If Mr. Rodriguez indicated that the determinations which were reached in August of 1988 with respect to the Vacia Talega project were completely your responsibility, would that be correct?

A False. It is not correct.

Q Whose responsibility would it have been?

A He is ultimately responsible as the administrator. He was the boss.

Q Did the boss know what was going on with respect to this project?

A Of courses.

Q Was he following it very closely?

A Correct.

[279]

Q Was he giving instructions to his subordinates with respect to the conduct of this case?

A Yes, that it be evaluated.

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[280]

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Q So, it's your testimony that the consensus that was reached in February of 1987 was not discussed in the January 1988 meetings that were held?

A The discussion of July of 1988 or more recently resolution P 139 of the Board and the certification regulations, under condition of the plans and the documents which document was discussed, the recommendations of the attorneys, and it was decided what has been reduced to writing in the letter of August of 1988.

Q That was a letter that you signed, correct?

A That's correct.

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[283]

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Q In March of 1987 when Mr. Rodriguez became administrator, whose responsibility was it to oversee the Vacia Talega project at ARPE?

A The case was in a status quo without any final decision. And it was under the jurisdiction of the division on urbanizations and the attorneys.

Q In March of 1987?

A To my best understanding and it was in that — and it was just so for months.

Q You said that a final decision not been reached.

Hadn't a final decision been reached at the February of 1987 meeting?

A The final decision was taken in July of 1988.

Q There was a consensus that was reached in

[284]

February of 1987?

A There was a meeting, I don't recall the consensus. But it was not final because as I recall nothing final came out, as in July where a document did come out establishing the decision to be taken.

Q Correct me if I'm wrong, I thought you testified a short time ago that you couldn't recall whether in fact a document had resulted from the February, 1987 meeting.

Isn't that correct?

A No, I don't recall.

But you're asking me if there was a decision, and I said that the decision was taken and was established in a document, an official document signed by me in August of 1988 and that is a decision.

Q Well, as you sit here today can you say whether or not a final decision was reached in February of 1987?

A I don't know. I don't recall.

Q So, there may have been a final decision and you're just not aware of it?

A It may be, but the document would be in the file as is my letter.

* * *

[285]

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Q Between March of 1987 and July of 1988, did

[286]

anything occur within ARPE with respect to the review of the Vacia Talega project?

A I don't recall.

Q Was there any official action that was taken?

A The official action was taken in July.

Q During that period whose responsibility was it to oversee the case?

A It was this status quo in a pending file.

Q That must fall within someone's jurisdiction within the ARPE organization, is that correct?

A It was in the regional operations area and before the attorneys.

Q In March of 1987 the case was before the attorneys?

A I imagine so.

Q And it remained before the attorneys until when?

A Until July where the group meets and the decision is taken and the attorneys participate. And the technicians also.

Q Aside from the attorneys, was there any individual in ARPE who had responsibility for the Vacia Talega project in March of 1987?

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[291]

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Q In other words, your memorandum which you indicate was prepared by Mr. Ayala indicated that it was recommended that there be prepared a communication, is that correct?

A It says it was recommended. It doesn't say that it was agreed upon.

[292]

Q Well, that would have been the recommendation that resulted from the meeting, is that correct?

A A recommendation is a possible action that can be taken. An agreement is a definite action that is taken.

Q In other words, in a definite action you've reached a conclusion?

A A decision is a conclusion.

Q Well, that memorandum indicates that a conclusion was reached, wasn't it?

A Engineer Ayala says that it was recommended that it be prepared, not that it was agreed upon.

Q But wasn't there a broad discussion of the position of the agencies and some conclusions were reached, isn't that what the document says or am I missing something?

A What it says here is that a communication was recommended that it be prepared.

In our terminology if you'll allow me —

Q Yes, please.

A In our terminology, a recommendation is not a decision until it is duly adopted and certified by the person with the authorization and faculty for so doing.

[293]

For example, the approval of a project is recommended and the supervisor understands that the recommendation is not adequate and he revokes it because he is the person with authority. And that is the agreement and that is the difference between recommending and agreeing.

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[305]

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Looking at the first page of that exhibit in the information that is set forth just on that first page, would that information indicate to you that these plans are being offered as construction drawings

[306]

for urbanization works?

A It could be because of the way that it is presented graphically. Let me explain. You present the parcelling of land, it shows within the parcel of land apart of the project.

Even more specifically, it refers to a block within the development and here it says so.

Q Given the title preliminary project plans and the 19 sheets which are described in the index, would you characterize these drawings based on that information as construction drawings for urbanization works?

A It could be. Because it contains items that belong to urbanization works.

Q Construction for urbanization works would not include drawings of structures, would they?

A It could include it.

Q Is that normally the case?

A It depends on the designer.

Q Well, let me put it this way —

A We have both types of plans, includes the structures and that doesn't include the structures.

There's no rule or norm because it's up to the individuality of each designer.

* * *

[308]

* * *

Q The meetings in July of 1988 culminated in the letter of August 2, 1988 which you sent to Basora and Rodriguez, is that correct?

A Yes.

Q And that was the one that told them that their project was no longer in effect?

A Yes.

Q Is what you're telling me that these were the drawings that were considered in the meeting which

[309]

resulted in that letter?

A At least that is what it seems to me that they were there. It seems to me — They seem to be this copy.

Q Were there any other sets of drawings that were available in the file at that time other than this set?

A I have no knowledge of that.

* * *

[312]

Is that a letter from Mr. Colon to Mr. Rodriguez?

A Yes, this is a letter that was sent by Engineer Colon to to Engineer Rodriguez.

Q And as we discussed earlier in the deposition, it appears to have been a response to CM-2 which was a submittal letter from Mr. Luis Rodriguez to ARPE, is that correct?

A Yes, that's correct.

Q Now, you mentioned a letter that accompanied these drawings just a short moment ago.

Were you referring to the document that is been marked CM-2, that is the February 22, 1982 letter from Mr. Rodriguez?

A Yes.

Q Where in that letter if you could point out for me, where in that letter does it make reference to the plans that you have in front of that you have been marked as PJS-10?

A In the last paragraph. It reads and I quote "We would appreciate the prompt consideration by ARPE of the construction plans of the development works of block number 2 and the advance approval of the general land movement works for said block as presented in sheet 9 of

[313]

the construction plans submitted."

Q I'm going to be very clear on this. Based on that last paragraph were you saying that these plans were submitted as anteproyecto and by these plans I mean those represented by PJS-10 -- Are you saying that these were submitted as anteproyecto based on the last paragraph in that letter?

A I didn't have this under consideration because I understand that the letter is the transmittal document that accompanied the plans which were submitted originally which is as is usually done and as Engineer Rodriguez has done it historically or traditionally.

Q My question was are you testifying today that the last paragraph of that letter indicates that Exhibit PJS-10 was intended to be anteproyecto?

(Whereupon, the pending question was read back by the court reporter as requested by counsel and the following occurred:)

A The terminology of that question is not properly formulated, if you'll excuse me.

Q Let me go back to the beginning. In the letter of February 22, 1982, where does it reference the

[314]

plans that are reflected in Exhibit PJS-10?

A As I said a while ago, the letter this accompanies the plans that were submitted and it says clearly there that advance approval is requested for general earth movement works for block number 2.

Q And that is in the last paragraph, correct?

A Yes.

Q And do you believe that last paragraph refers to the plans you have in front of you?

A It should refer to it because it makes reference to block number 2 and here it speaks of block number 2 and here it says in the letter block number 2.

Q It makes reference to that last paragraph, though, the construction plans for urbanization works, doesn't it?

A It speaks of that.

Q On that first sheet of the exhibit, is the phrase construction drawings used anywhere?

A No, it doesn't say so.

Q And the drawings contain letters which are very large, is that correct?

A Yes.

Q So, this isn't a case of missing the fine print, is it?

[315]

A But the letter that accompanies the drawings is the essence of what is being requested here.

Q The last paragraph of that letter makes reference to advance approval of urbanization works as presented in sheet number 9 of the construction plans which were submitted.

Do you see where I'm at?

A Yes.

Q I paraphrased it slightly, but is that an accurate interpretation of that paragraph?

A More or less.

Q I'd like to direct your attention to sheet 9, on the plans that you have in front of that you are marked PJS-10.

Do you have them?

A Yes.

It says section condo-hotel building number one.

Q It's a structure, isn't it?

A Yes.

Q Please turn to page 9 of those drawings. Is page 9 a representation of the structure?

A Yes. It's a cross section of the architectural face of the structure.

[316]

Q It's a type of drawing that is contained in anteproyecto, isn't it?

A It's included.

Q If I can direct your attention back to the first page of the exhibit, does sheet 9 of the exhibit appear to bear any relationship to sheet 9 that is discussed in the February 22, 1982 letter?

A No. The reference that it makes here of sheet number 9 speaks of earth movements which should be included there, but here on the plans something else appears.

However, a project where in earth movement is requested does not have more than 3 sheets as a general rule. Therefore, the information indicated in the last paragraph should be on the second or third sheet.

Q The second or third sheet of what?

A When you submit an earth movement plan it just includes this that is here, the topography. And the levels, lots of division.

Q It's appropriate, is it not, for a proponent to submit for advance approval, drawings of earth moving works, is that correct?

A That is at his discretion, at the discretion

[317]

of the project developer.

Q The proponents can do that, submit those as part of the his construction drawings for urbanization works, is that correct?

A If he submits an earth movement he has to submit the complete project, and I referred to the whole approved project.

If in this case it was 106 acres or cuerdas, he had to submit the project for the 106 cuerdas. If it's a construction plan, complete construction plan, then it could be a partial construction plan which may include just part of the whole

project. I hope you can distinguish between one and the other.

Q I believe I can. Let's see if we can distinguish something else here. The last paragraph of the February 22, 1982 letter is discussing, is it not, construction drawings for urbanization works?

A It speaks of that, but it's requesting earth movement.

Q And the advance approval for earth movement is described as representing sheet 9 of those construction drawings for urbanization works, is that correct?

* * *

[321]

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Q In July of 1988, you examined these or ARPE rather examined these drawings rather carefully?

A Correct.

Q Is there any inconsistency between the index, what was represented in the index and what was contained in the sheets accompanying it?

A Analysis was made of the information that is here, and the information that appears here is the one that appears in the plans.

THE INTERPRETER: By here he was pointing to a particular part in the index page.

A It's what was included in general terms in the contents of the plans.

BY MR. RICHICHI:

Q As you sit here today, is it your testimony that the plans that you have in front of you were submitted by Mr. Rodriguez as construction drawings for urbanization works?

A It could be either of the two. He speaks of both because he speaks of both in his letter. He speaks of both things. It's here and here (indicating).

[322]

Q As you sit here today is it your testimony that it is more likely that the plans that you have in front of you were not submitted by Mr. Rodriguez as construction drawings for urbanization works, but instead as anteproyectos?

A I indicated that it includes more in that direction and the direction of the anteproyecto.

Q Is it true that the only basis, the only factual basis which ARPE had for concluding that these drawings were intended to be submitted as construction drawings for urbanization works was the fact that they were the only drawings in the file?

A There being no other plans, we have to assume that this is all there is because here it indicates that previously the anteproyecto plans had been returned.

So, therefore, one must assume that anteproyectos do not exist. Then, the remainder is understood what is pointed out in the letter as construction plans for advance works for land movement. And from that you can conclude from the face of this document and from the petition of Engineer Rodriguez.

Q So, I return my question. I think you answered it, but I want to make sure.

[323]

The only factual basis that ARPE had for concluding that these drawings that are PJS-10 were intended to be submitted as construction drawings for urbanization works was the fact that they were the only drawings in the file?

A Yes.

Q And following up on a point you had touched on earlier, in your August 2, 1988 letter to Mr. Rodriguez you indicated that one copy of the plans had in fact been retained, correct?

Let me tender to you to help you with that exhibit CM-10.

Q Have you had a chance to read that document?

A Yes.

Q This is your letter, right?

A Correct.

Q I direct your attention to the last paragraph of that letter.

A Yes.

Q Well, first, I believe you indicated that the drawings you have in front of you were the drawings you used to generate this letter, is that correct?

A Correct.

Q You even mention in the second to the last

[324]

paragraph that they're entitled preliminary project plans in quotes, is that correct?

A Yes, preliminary project plans.

Q And you indicate that you returned or you're returning rather a copy of that document, one copy that you had kept in your files, is that correct?

A Yes, the copy that was being returned with that letter.

Q And what did you indicate had happened to the other copies of PJS-10?

A That is all there was in our files.

* * *

[336]

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Q Do you recall any documents being put in the special projects file related to Vacia Talega as a result of the February 1987 meeting?

A No, I don't recall.

The documents are filed when they're official like in one.

MR. BLANCO: By this one he's referring to CM-10.
BY MR. RICHICHI:

Q Do you have any recollection of discussing with Mr. Rodriguez a proposition that certain documents would be put away and kept safe until the case was over?

A No, I had no reason.

Q Is it possible that in 1987 you told Mr. Rodriguez that a letter had been prepared as a result of the February 1987 meeting?

A I don't recall.

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Q This project I believe you indicated was an important project, is that correct?

A Yes. All projects are important.

Q In particular, with respect to this project, it did draw enough attention to cause the heads of all the agencies to be brought in to a meeting in September of 1986, correct?

A Yes, that's correct.

Q In your August 2, 1988 letter in effect you told Mr. Rodriguez, Luis Rodriguez, that the project ceased having effect back in 1983, is that correct?

A Yes, that's correct.

Q If the project ceased to have effect in 1983, what was the purpose of having that meeting in 1986?

A Because we had not concluded in a definite manner concerning the effectiveness of the project.

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[340]

* * *

Q Did anyone think to determine whether a project was still in effect before you had this meeting with all the heads of the agencies in the government of Puerto Rico in September of 1986?

A Because reasonable doubt existed, precisely one of the reasons is to gather information from the different agencies to have more information so as to subsequently conclude something about the case or reach a determination or a decision including the aspect of the effectiveness.

* * *

Q And there never to your knowledge had been another meeting like this in all your experience at ARPE,

[341]

had there?

A This is a deviation from the standard.

Q In fact, present were the heads of all the agencies of the Puerto Rico government?

A At least the heads of the agencies with more input into a case like this or representatives.

Q And they were all there to discuss a project which ceased to have effect 3 years before that, is that correct?

A That had not been determined.

Q Well, it's been determined now, right?

A It was determined in July of 1988, and the proponents were notified by this letter about that officially.

Q But the fact of the matter is that according to ARPE, the project ceased to have effect in 1983, right?

A Now, and after all the evaluation and study which was made in the legal and technical aspect, that was concluded that that determination had not been reached in 1982, 83 or 84.

It was not until 1988 that it was reached because this case is not the current run of the mill case.

[342]

Q This case was treated differently than other cases, correct?

A That's correct.

Q And the decision wasn't made until 6 years after the drawings were submitted, correct?

A That's correct.

Q Wouldn't it have been embarrassing for Cruz Marcano if it had gotten out that all these agency heads had come to discuss a project which had ceased to have effect 3 years before the meeting?

A No, it wouldn't be. It wouldn't be because the case was in a stage of review of analysis. And precisely the presence of those people was to elaborate and have more information to make a more adequate decision.

Q In your view, is this a politically controversial project, Vacia Talega?

MR. BLANCO: Objection.

A It has problems because there are bills pending in the senate that have been under consideration since 1986 or 1987 which definitely affect this project.

And in addition, the Planning Board is in an evaluation stage to establish public policy in regards to all this land which could affect this project.

[343]

Or if not the project, the plot or the parcel of land on which this project is.

BY MR. RICHICHI:

Q How would that affect this project?

A Because it can establish new regulations, which might not permit the development of the lands for other purposes other than the new regulation might adopted.

And, as a matter of fact, the intention, the legislative intent, is to keep these lands under developed so that same maybe like a park, green area for the use and enjoyment of the Puerto Rican community. For that reason, it could have a political relationship or of a public policy relation. This project which was what I mentioned previously.

Q You're referring to the legislation, correct?

A Correct.

Q With respect to any activities that the Planning Board is pursuing, how would this project be affected by those?

A It could be affected or it could not be affected. That is a determination that the Board will eventually make, which is the agency that regulates the

[344]

use of lands in Puerto Rico.

Q Is it more likely that the Vacia Talega project would be affected if it was not an approved project?

A I don't know. The Planning Board would have to answer that question because they're the ones that have the expertise in that regard.

Q There's some sort of a study that is being undertaken by the Planning Board with respect to the Pinones area, isn't that correct?

A I know that preliminary plans have been made, preliminary studies have been made, but at this stage I don't know if they're carrying them out at this moment.

Q Did you ever have to help prepare testimony to be given to the Puerto Rican senate regarding the Pinones area?

A Me or the agency?

Q Did the agency ever present testimony?

A Yes, it has presented.

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Q Did you ever discuss it with Mr. Motta?

A Motta and the attorneys.

MR. BLANCO: Maybe you should translate that last question for him.

THE INTERPRETER: He didn't ask for a translation.

MR. BLANCO: I'm asking for one.

A On that with Mr. Motta, no. Because the project of the legislature was referred to the attorneys, which is the way it's usually done. The answer were prepared and they were presented.

BY MR. RICHICHI:

Q Which attorneys if you know would have been involved in that?

A I think it was Melendez. He doesn't work with us anymore.

Q When you're reaching a decision such as the decision you reached in August of 1988, what is the role that the attorneys are to play in achieving a consensus as you understand it?

A In order to determine according to the applicable laws, according to our rulings or adjudications and according to what is provided in the regulation that is we administer the legal opinion in

[346]

that regard.

And as much as in the majority of cases, are questioned in appeal forums and therefore they have to have a solid legal basis.

Q Do you understand the role of the attorneys to be to pressure the engineers to reach some sort of conclusion?

MR. BLANCO: Objection.

A I think that the purpose is to guide and to advise. That is what they're there for.

BY MR. RICHICHI:

Q So, as you understand it they're not there to exert pressure on the engineers to reach a particular conclusion?

A No, they recommend and they can say what can occur and what should not occur.

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Q Did any of your subordinates ever tell that you PJS-10 were not construction drawings for urbanization works?

A Yes, that was determined. Colon said that there were no plans for urbanization works.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.	}	CIVIL NO. 87-01915 (HL)
Plaintiff,		
vs.		
RENE ALBERTO RODRIGUEZ,		
et al.		
Defendants.		

EXCERPTS FROM THE DEPOSITION OF LUIS
RODRIGUEZ (OCTOBER 11, 1989)

* * *

[11]

* * *

Q Sir, can you define some terms for me.

What is a preliminary development?

A A preliminary development is a schematic drawing which is prepared at the general development of a project, including lots, streets, areas to be devoted for public use, and some other important features of the projects which you wish to highlight during that stage.

Q Does that have to comply with any kind of conditions set by ARPE?

A That should comply not only with conditions established by ARPE during the transaction that involves the preparation of the development, but should also comply with the conditions established by the Planning Board, in approving what is called the location consultation of the project, which is simply the Board's public policy decision concerning the use of land.

It should also comply with conditions

[12]

that may have been established by different agencies.

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Q What would be the next step?

A After the preliminary development of the project has been approved —

Q Do you mean approved by ARPE?

A Yes. ARPE then would grant one year to certify the final construction plans.

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This should have been taken care of during a relatively short period of time. However, the approval of that internal development of the blocks by ARPE took approximately three years. We feel that the reasons for that was that ARPE became involved in conceptual elements which to the best of our understanding the Planning Board had already resolved, but nevertheless ARPE became involved in it and we had to deal with them.

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Q Now, sir, can you tell me what is a construction plan?

A A construction plan is a document that itemizes the construction work relative to either a building or an urbanization and should include sufficient information to allow for the construction of the project.

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* * *

Q What are the two types of construction plans?

A As I mentioned before, there are construction plans for structures, buildings. And there are construction plans for urbanizations or housing development work which we call land improvement.

Q Which of those were submitted in the PFZ case?

A In the PFZ case in the year 1982, sets were submitted, five copies of two sets of the two types.

Five copies of a set of construction plans for urbanization works were submitted and also submitted was a preliminary and a set of preliminary project plans was submitted for the structures.

I would like to clarify that because I feel it is important. I repeat that in the year 1982, we submitted in the case of PFZ two sets of completely different plans, five copies of each one as required by the guidelines at the time, one set was the set of construction plans for the urbanization work of the first block in the first stage of the project and the second of which we also submitted five copies consisted of a

[18]

preliminary project for the buildings which were intended to be built in the first block of the project for which construction plans had been submitted.

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[19]

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Q All construction plans are submitted pursuant to a resolution from ARPE, right?

A Correct.

Q In the cases where only the movement of land was permitted preliminarily and the rest of the plans were submitted subsequently as you have just testified, was that specifically permitted by the resolution of those plans?

MR. RICHICHI: Objection, I don't think it

[20]

accurately reflects his testimony. I'll let him answer.

A No, not necessarily. This was within the authority of the technician who was reviewing the case to consider it.

* * *

Q Have you ever seen any regulation of ARPE or of the Planning Board that permits that practice?

A I wouldn't be able to say for sure, but I believe that resolution P 139 provides for the approval of land movement in an advanced manner.

Q Does that resolution provide that the subsequent plans can be submitted after the end of the year granted by the resolution?

[21]

A I don't recall.

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Q And at this stage in the 1978, the stage of the PFZ project, who had to go to these agencies to obtain their comments or endorsement?

A I would say it was a combined effort between the developer and the agencies

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Q Is it your testimony that the construction plans of the project do not have to be approved by PREPA?

A I haven't said that.

Q Well, do they have to be approved by PREPA?

[28]

A They should be approved by PREPA, yes.

Q You say they should be. My question is do they have to be?

A They have to be approved by PREPA, yes.

* * *

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agencies with respect to the specific aspects of infrastructure which those agencies govern.

Q When you say agreement with the agency, is that the same as saying the endorsement of the agency?

A I would say so. It's the endorsement of the agencies with respect to the servicing of a project.

Q When did PREPA endorse this project, the PFZ project?

A The servicing of the project, I don't remember when it was that we received the first letter; but as I stated before, we still have the endorsement of the PREPA services approved.

Q Well, can you give me more or less a year when you received that letter?

A I think that the first letter it's probable that it was in 1978 or 1979.

Q And you say the first letter. There have

[32]

been others?

A Yes. What happens is that agreements with PREPA expire at the end of one year. The reason is that they continue to improve on their facilities, and they want to revise them from year to year.

And a project such as this which has taken so long in its processing at ARPE, so they revise these letters on a yearly basis and the latest letter will remain in effect until the year 1990. I should also indicate that at the meeting held at ARPE in 1986 at the request of ARPE, the executive director at the Electric Power Authority attends it and at no time was it mentioned during this meeting either by him or the other agency heads that there was any kind of problem with respect to servicing this project.

Q Am I to understand that you've been receiving a letter from PREPA every year?

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Q Has PREPA ever specifically approved any construction plans for the project of PFZ?

A No.

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Q To your knowledge, has the Aqueduct and Sewer Authority ever approved the construction plans for the PFZ project?

A No. I wish to explain once again what I have always explained concerning approvals, that the process at the time really consisted in submitting the plans to ARPE, obtaining the comments, revising the plans

[39]

in the proper fashion as indicated by ARPE, and proceeding to obtain the endorsement of the agency.

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* * *

Q Let me ask you, going back to the PREPA situation for a moment, you stated that PREPA has never approved construction plans for the PFZ project.

My question is has PREPA ever requested such plans for their perusal and approval?

A No.

Q What about the Aqueduct and Sewer Authority?

A No.

Q And the Highway Authority?

A No, not them either.

Q Public Works Department?

A No.

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* * *

Q Well, I don't know if that was an answer to my question.

My question was whether construction plans were submitted to ARPE within a year after the Supreme Court decision relative to this case?

A And I'm telling that you no construction plans were submitted because ARPE instructed us not to do it.

Q Who at ARPE instructed you?

A In ARPE we start dealing with the case in the year 1978 and dealt directly with Engineer Jorge Colon.

And Engineer Colon should remember that we had to resort to the administrator of the agency at the time, Engineer Salva Matos, to reach several conclusions related to what ARPE finally decided.

* * *

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* * *

Q Is it your testimony that Engineer Jorge Colon told you that construction plans were not necessary — it was not necessary to file construction plans within a year after the Supreme Court decision?

A That is correct. If it weren't so, then ARPE's resolution is mistaken.

Q Was this statement made in writing?

A No, it wasn't in writing.

Q Was it a conversation that you and Mr. Jorge Colon had?

A It was during conversations related to the discussion of the case.

* * *

[63]

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Q Was this on one conversation or on several conversations that Mr. Jorge Colon told you this?

A It must have been during several conversations because the processing of the case lasted approximately three years.

Q To your memory, sir, was there anybody else present during those conversations when Mr. Colon stated that?

A I don't recall, but there may have been some other official present.

Q To your knowledge, has Mr. Jorge Colon ever stated that advice to anybody else other than you?

A Well, when this was discussed with the administrator it was discussed under these same terms.

* * *

[67]

* * *

Q Well, again, in 1978 did you or did you not request additional time to submit construction plans for urbanization works?

A According to ARPE's interpretation, it wasn't necessary to submit the construction plans and therefore, we did not request for an extension of time.

And this was because ARPE told us to submit first the internal preliminary development of the blocks so that to then be granted an additional year to submit the construction plans. Those were the instructions we received.

Q And the instructions as you have stated before were received from Mr. Jorge Colon?

A Mr. Jorge Colon, and we met with the administrator of ARPE twice as far as I remember where

[68]

this entire procedure was discussed.

It's a process that lasted three years and so many people took part in it and so much time has elapsed that I'm only able to recall two names of persons who prominently dealt with us and that is Engineer Jorge Colon and Salva Matos.

Q And these instructions were always given to you orally?

A I repeat once again as I stated before, that in the process of coordinating these projects many things are done on an informal basis which is the case also with the revision of construction plans and that is the customary practice, which is based entirely on professional trust.

Q So, I gather then that your answer is yes, it was always orally?

A Correct.

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Q Prior to that 1986 letter that you were just referring to to Mr. Lionel Motta, did you ever write Mr. Motta relative to the PFZ Vacía Talega case?

A No.

Q Have you ever prior to that letter of 1986 did you ever hold any discussions with him as to the Vacia Talega PFZ case?

A No. I wish to clarify that one doesn't usually bother the administrator with details of this sort. It's only in situations such as this or when a great number of years elapse.

* * *

[78]

Q Have you ever had any correspondence between you and Engineer Ayala one way or the other?

A In relation to this case?

Q Yes.

A Not that I remember.

Q Have you ever had any conversations with him relative to this case?

A Not directly about the case, not as far as I remember.

* * *

Q Sir, do you know Engineer Edmundo Colon Arizmendi?

A I met him briefly in the year 1982. He was the ARPE administrator at the time.

Q Did you ever hold any conversations with him

[79]

relative to this case?

A I believe I visited him once to let him know that we would be submitting the construction plans for the project shortly thereafter.

Q And this was in 1982?

A I would say it may have been at the beginning of 1982 or at the end of 1981. I do know that it was after ARPE had approved the alternate preliminary development.

Q And before you submitted the plans?

A Correct.

Q Other than that or in that one visit that you had with him, did you ever deal with him whether via conversation or via correspondence in any manner relative to this case?

A No, because as I stated before we hardly ever bothered the administrator except when there is a deadlock at the project.

* * *

[81]

* * *

Q And those, the preliminary projects plans for the buildings, are the only ones you submitted in 1987?

A That's correct.

I would like to add something else. Those were the only plans submitted in 1987 and that were registered by ARPE as projects with a case number and everything assigned to them, but I would like to tell you about the great difficulty we had to get ARPE to accept those preliminary project plans as an official case.

And I wish to explain it because the way in which it was handled is highly irregular. I sent my brother who works in my office to submit and file those plans as anybody would do with ARPE's mailroom and filing area.

It just so happens that when my brother was filing the case, Engineer Pedro Juan Sanchez

[82]

approached him because he knows my brother and they started talking while the case was in the process of being filed. At that points in time, the filing area had to consult Engineer Sanchez with respect to certain aspects of the plans that were being submitted and when Engineer Sanchez became aware that something was being filed with relation to a preliminary project of the PFZ project, he gave instructions to the effect that the case could not be received as a preliminary project or as a case.

Now, the reason he gave my brother, because he obviously protested, was in terms of asking him if he had not read the newspapers during those last if you days where there were comments to the effect that all projects in the Vacia Talega area had been brought to a halt. And my brother protested, but the case could not be filed.

However, subsequently a letter was written, and it is my understanding that counsel for PFZ had conversations with the ARPE administration and the case was subsequently accepted. I wanted to state this because I feel that it is a highly irregular situation which is closely linked to the case.

* * *

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* * *

We submitted some preliminary projects, and I wish to emphasize that that was the reason why we submitted the preliminary projects. Because we feel that it is very difficult to be able to evaluate this project, to evaluate the construction plans of the urbanization work separately from the construction plans of the buildings.

* * *

[104]

* * *

Q The question is simple. As of today has condition 14a contained in page 7 of the document we're dealing with, as of today, has it been complied with?

MR. RICHICHI: Objection.

A Well, before answering I wish to clarify the following: There's a part of the condition with which it is impossible to comply because it deals with the buildings.

Now, the other part states prior to authorization of any urbanization works since ARPE has not reviewed the plan, nor authorized any urbanization work with relation to this project, we simply feel that this is not the time to obtain the document.

Whenever ARPE is willing to approve the urbanization works, then we would be in a position to obtain the document endorsed by the Environmental Quality

[105]

Board.

* * *

Q Has it been complied with as of today, yes or no?

MR. RICHICHI: I'm going to interpose an objection here. I think witness has responded. Previously you said you wanted a yes or no answer if it's possible. The witness has already testified that we're talking about a future condition here, and I believe he's indicated that it isn't possible to respond to your question with a yes or no.

[106]

MR. BLANCO: I don't believe he said that. I agree that he understands it is still an open-ended condition that he is still in time to comply. All I've asked you is has this document that is requested here been provided to ARPE as of today, yes or no?

A No, it has not been furnished to ARPE because of the reasons I explained.

* * *

[109]

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MR. BLANCO: This document was produced last week by the plaintiffs in this case as the construction drawings, the final construction plans for urbanization works submitted in February of 1982 relative to the PFZ Vacia Talega project.

* * *

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* * *

Q Sir, do you recognize this document? This document shall be referred to as Exhibit LR-C of this deposition.

(Whereupon, Deposition Exhibit No. LR-C was marked for Identification as of 10-11-89.)

A Yes, correct.

Q What is it?

A This is the set of construction plans for urbanization works of block number 2 of the Vacia Talega project.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.

Plaintiff,

vs.

RENE ALBERTO RODRIGUEZ,
et al.

Defendants.

CIVIL NO. 87-01915 (HL)

EXCERPTS FROM THE DEPOSITION OF RAMON
AYALA SANTIAGO (OCTOBER 13, 1989)

[9]

* * *

Q Would that have been the time at which you first became involved with the Vacia Talega project?

A No, not necessarily. When the project comes to the central office it was Engineer Pedro Juan Sanchez who was the head of our division at the time.

When these cases were transferred from the regional offices it was engineer Pedro Juan Sanchez who would receive them and then assign them. Engineers who had come over from other regional offices had problems because of the distances involved and they went back to their regional offices and only Pedro Juan Sanchez and myself were left.

At the time, I had around 60 cases around to me, and there were only 26 us considering projects. And engineer Pedro Juan Sanchez had the other 70 cases including Vacia Talega.

I became involved with Vacia Talega as such when in 1986 a letter is received from the Basora and Rodriguez firm inquiring about the status of the case.

* * *

[17]

* * *

At that time do you know if Engineer Juan Morales was still involved with the Carolina office?

A Yes.

Q Do you recall how long he remained on at the Carolina office?

A I think that up to 1985.

Q Did you ever have any discussions with Engineer Juan Morales about the processing of the Vacia Talega project?

A Not as to Vacia Talega specifically. As to other projects yes, but not Vacia Talega.

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Q What effect did that have on the processing of plans?

A Well, there's a slight change when the certifications act is passed in 1984 for land development, for urbanizations.

That is planning regulation number 12. This regulation makes the approval of these projects viable. Then, many developers who had their developments pending evaluation there were sent a communication informing them about a moratorium which would allow them

[20]

to resort to that new method. And a fair number of these projects were then considered under this new line of action.

Q Do you know whether the Vacia Talega project remained as part of the Pedro Juan Sanchez caseload until he was replaced by Jorge Colon in 1986?

A That is my understanding.

Q When Jorge Colon came on in 1986, did it become parts of Jorge Colon's caseload?

A Yes.

* * *

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Q Are you familiar with an individual by the name of Luis Rodriguez?

A Yes.

Q How long have you known Mr. Rodriguez?

A Well, I know him on the professional level.

[26]

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Q When you were working at the central office was it the case that sometimes you would deal personally with the representatives, proponents of projects?

A Yes, on a day to day basis.

[27]

Q Was it a common practice at ARPE for engineers such as yourself to deal with proponents of the projects on a daily basis?

A Yes, because the project developers are trying to get their cases moving, to move ahead.

Q Would it have begin the case that the project developers through their engineers would have come in to talk to you about the status of the cases?

A It's possible.

Q Did that occur on a regular basis?

A Yes. Fairly regularly.

Q When you were working in the central office after 1983 do you recall occasions when you would have seen Mr. Rodriguez in those offices?

A Yes.

Q Were there projects which were in your caseload that he would have been contacting you personally about?

A No.

Q If an engineer wanted to check on the status of his case did he have to make a formal appointment back in 1984?

A Know. The person didn't have to request an appointment. It was regulated on the basis of several

[28]

days a week assigned or sometimes only in the mornings.

Q So, there were specific times set aside when engineers could come in and check on the status of their projects without having an appointment?

A Without requesting an appointment, correct.

Q Was that also the case in the regional offices?

A Correct.

Q Now, when this letter came which you believe was from Basora and Rodriguez, can you describe for me how you first found out about it and from whom?

A Well, the letter comes to the hands of Engineer Cruz Marcano Robles.

He was the assistant administrator in charge of regional operations and director of the work section to which I was assigned. And then a meeting was held and at the invitation of Engineer Cruz Marcano I took part in that meeting. And that is the first time that I become formally involved with the project.

Q Did Mr. Colon report to Mr. Marcano at that time?

A That's correct.

* * *

[30]

Mr. Ayala, Do you believe you've seen this document that we've marked as Exhibit RA-1 prior to the date of this deposition?

A Well, in terms of the history, yes, but not the memorandum.

Q There is what appears to be on the first page a cover memorandum from Mr. Marcano to Engineer Rene Rodriguez, is that correct?

A Correct.

Q And then attached to what are some pages could you just -- how many pages are attached to the copy that you have?

A Seven sheets.

Q So, there's 7 sheets in addition to the cover memorandum, is that correct?

A Correct.

Q Do those 7 sheets constitute some sort of history of the project?

A Yes, that is correct.

Q Do you know who prepared those pages, the history?

A Yes, they were prepared at our office.

Q Were you involved in the preparation of this?

[31]

A Yes.

Q Were you principally responsible for preparing this summary?

A No, not necessarily.

Q Was it a joint effort?

A Yes, joint.

Q Do you recall who else was involved in the preparation of it?

A Yes, well the form is that a draft is prepared. Once that draft has been prepared, it is forwarded to Engineer Jorge Colon.

And it's first a handwritten draft and it's subsequently typed. And then Engineer Cruz Marcano, who is the head of the division, will check it and if it is correct it will be typed in its final version.

Q Did you prepare the handwritten draft that was forwarded to Jorge Colon?

A Yes, that's correct.

Q So, before it went to Rene Rodriguez it would have been reviewed by at least yourself, Jorge Colon and Cruz Marcano?

A Not by me. I prepared the draft and then this draft will go up the chain of command to be checked and it doesn't necessarily come back to me.

[32]

Q Do you think you would have seen the final document that went to Rene Rodriguez at the time?

A In relation to these ones?

Q Yes, pointing to the exhibit.

A Yes.

Q As you sit here today is there anything in this history which you believe is not accurate?

A The last page, page 5, numbers 29, 30 and 31, I can't really say for sure. I'm under the impression although the contents are similar to what we included in the draft because activities would be added onto the draft while this was being processed.

Q At the time you would have seen this back when the final document was prepared, was there anything that you thought was inaccurate at that time?

A No.

Q When you were talking about items 29, 30 and 31, were you saying that they were not accurate or that things were added which may have come from other individuals than yourself?

A They are accurate. What I'm not able to ascertain is whether we did it in our section or if it was subsequent because these are the latest events.

Q If you had not prepared these in your

[33]

section, who do you believe would have prepared them?

A I haven't said it wasn't at my office. It may have been. But it may have been Jorge Colon, Cruz Marcano, Engineer Marcano.

Q Now, in preparing the draft that you worked on how did you go about doing that, what information did you look up?

A Well, using the file that Engineer Juan Morales brought over, in addition to that in the central file of ARPE write is on the 10th floor, we compiled all the documents that were to be found at the agency in relation to the project. We're talking about 4 or 5 drawers with files.

After going into these files, you have to look through everything in order to become knowledgeable of the history and the chronological order. And after having compiled the information we then put it in order according to date.

Q Did anyone in your section assist you in compiling this information?

A No. At the time I was all by myself in the division.

* * *

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Q The material that Juan Morales had brought, that was not in the central file, is that correct?

A Not necessarily.

Q It was somewhere near your office?

A Well, from the moment -- Yes, from the moment I'm commissioned to prepare the history I take all the documents related to Vacia Talega to my work table.

Q In terms of the drawings that were in the files that you reviewed, what types of drawings were in there?

A You're referring to the drawings or plans that had been submitted?

Q Yes, that were in the file.

A Yes, there was a set of drawings.

Q In the several drawers which you reviewed you found how many sets of plans?

A There were one or two. I wouldn't be able to tell you exactly.

[38]

Q Were these different types of plans?

A No, the same copy.

Q So that there may have been one or two copies of the same type of plans?

A Of the same, correct.

Q Can you describe for me generally what type of plans they were?

A Well, the plans had a typical dimension for this type of plan and had brief details concerning the location of receive several buildings.

There were some sheets that included facades and there weren't a great number of them in terms of sheets.

Q Now, did you review these plans at that time?

A Not review them because I had been charged with preparing a history. So, I just became familiar with them.

Q But you at least looked at the plans, is that correct?

A Yes, correct.

Q Do you recall who else would have looked at those plans at that time?

A Well, Engineer Pedro Juan Sanchez who was

[39]

the one who had it and in this case I myself to whom it had been assigned.

Q With the about Cruz Marcano?

A I wouldn't be able to say whether he had seen them or not.

Q How about Jorge Colon?

A I couldn't tell you that either.

Q In terms of the way the documents were kept with respect to the Vacia Talega file, was that similar to the way other projects were kept?

A Yes, that's correct.

Q In reviewing construction -- Let me back up.

I believe you testified earlier that you reviewed drawings related to urbanization works, is that correct?

A Yes, correct.

Q Would that include construction drawings for urbanization work?

A Specifically, yes.

Q Would you have also had an opportunity to review anteproyectos for buildings?

A Not at that time.

Q Did you have an understanding as to what anteproyectos for buildings would include?

[40]

A Yes, correct.

Q Is that something distinct from construction drawings for urbanization works?

A Yes.

Q These plans which you reviewed, did they appear to be more in the nature of construction plans for urbanization works or anteproyectos for buildings?

A I didn't review them at the time. I saw them. But the information that the plans contained did not comply with what is required of a construction plan for urbanization works.

Q Did these plans appear to be more in the nature of anteproyectos for buildings?

A Yes, that is correct.

Q If you were going to describe anteproyectos for buildings, could you describe them as preliminary project plans for buildings?

A That is the definition it has when it's evaluated at ARPE.

Q Do you recall if these drawings had any sort of title in them on the cover page?

A Yes, they did.

Q What was the title that they had?

A If I remember correctly, it said preliminary

[41]

project.

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[43]

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I believe you indicated there were one or two copies of this sheet or set of plans, is that correct?

A Of the same copy of the plan.

Q In all the records you reviewed with respect to the Vacia Talega project there were only one or two copies of these?

A Out of the records I studied the only copies that were available were those that had been brought by engineer Juan Morales from Carolina.

Q When construction drawings for urbanization works are submitted with a project, do you recall back in 1982 how many copies of a set would be filed?

A Yes, for private projects from 4 to 5 copies would be requested. For public projects from 3 to 4 copies would be requested for final approval.

Q What would be the procedure back in 1982

[44]

before the certification process if a developer had submitted less than 4 or 5 copies of construction drawings for urbanization works?

A Yes. There's a justification for this. They would present two copies so that the ARPE technicians could evaluate them.

MR. BLANCO: there's something missing, the differentiation between review them that he just talked about.

A There was a justification for there being only two copies, the ARPE technician would evaluate one of the copies and would mark the comments in red.

This plan marked in red would be subsequently discussed with the developer and the situations which had been marked in red would be discussed at length seeking alternatives.

After agreements were reached with respect to what had been marked in red and once all of the endorsements from the pertinent agencies had been obtained, the developer would

then make corrections on his originals and would then present 5 sets of the plans with the corrections. It was a situation which would prevent them from incurring too many expenses in making excessive copies.

[45]

Q You said the developer would make corrections and present 5 copies. Present 5 copies to whom?

A To ARPE for final approval if it complied with the remarks.

Q If at that time 5 copies were not provided, then what would be done?

A Well, the 5 copies were because it was already at the stage of final approval. If they were not presented it wouldn't be approved.

Q Would you even accept something if the 5 copies weren't included?

A Well, the thing is that out of the 5 copies, two are for the proponents, including the approval. One is for the regional office which issues the document.

One is for the municipality where it lies, and the last copy is for the central offices to serve as evidence of the central office having approved that project.

Q Now, what did you believe was the reason why there were only one or two copies in the file you reviewed?

A Yes, because in the processing of cases the developers would present what are known as advanced

[46]

copies.

With respect to these copies the regulations are very clear in terms of it not extending the period of time granted for the development of the project. And it is a way of for him

to tell the ARPE technician take these two copies, check them and give me the comments so that I can then present them in a final version while he then takes steps to obtain the endorsements from the different government agencies.

Q Are you saying that is what you believe occurred in this instance?

A No. What I say is that there being only 2 copies of the plans, and the copies not containing what a construction plan should contain, it creates the impression that they were advanced copies that were presented.

Q So, you didn't know for sure, you just thought there was one possible explanation?

A Yes. When I have the file in my hands I see the two copies of the plans. And I felt that the only way they could be included as part of the presentation was if they were advanced copies.

Q Were these blueprint-type copies that you reviewed?

[47]

MR. BLANCO: What we were just discussing, is it is very difficult to find a Spanish word for blueprint.

For what it's worth I don't think your question was lost.

BY MR. RICHICHI:

Q Were the copies that you reviewed, were they blueprint copies?

A I didn't review them. The ones I saw are blue. They have the characteristics of a plan.

Q What I'm trying to establish is that these were not photocopies?

A No. They were blueprints.

Q Now, in preparing your history of the draft did you go back and look at actual documents?

A Yes, specifically to the agencies.

Q And that would have included correspondence?

A Correct.

Q And in reviewing that correspondence would you have read the correspondence?

A The one I mention in the history?

Q Yes.

A Yes, I read it.

* * *

[49]

* * *

Q Can you describe for me after you had this meeting with Marcano, and I think it was Mr. Colon, in 1986 what further action was taken involved here with the Vacia Talega project?

A Well, after the meeting for purposes of the history, several meetings were held with agencies.

And the general concern was that so much time having elapsed since 1970. We had to in reviewing the project consider that there were several agencies that did not exist back at that time.

Then, several meetings were coordinated with several agencies at the office of Engineer Lionel Motta. And my participation at those meetings was to prepare communications to invite these persons to attend to express their official position as an agency with respect to the project.

Q Was this a common practice at ARPE to evaluate a project in this manner?

A Yes. There are projects which because of the problems involved because of the type of project that is how it is done.

[50]

Q A particularly complex project might be handled that way?

A Yes. It's the fastest and most effective way from the standpoint of the processing.

Q So, certain proceedings might be applied with respect to complex projects that might not necessarily be applied to other projects, is that correct?

A Correct.

Q Is that spelled out in the regulations somewhere?

A Not necessarily.

Q Its just a matter of custom and practice at ARPE?

A No, but it depends on the type of project specifically.

Q But it was the practice at ARPE to treat complex projects in was other than might be specifically pointed out in the regulations?

A What happens is that the regulations establish a format for the procedure. And this type of project due to its capacity, there's no specific regulation in terms of how to process them.

I could mention as similar examples

[51]

projects such as Playas de Puerto Rico in Rio Grande. Palmas Del Mar is a project in the Humacao area, and Rio Maro over here. There are several.

Q Is it fair to say that in implementing its regulations sometimes ARPE has to interpret those regulations and apply special procedures?

A Yes, that is correct. It is important to indicate that ARPE as a regulatory agency collects from different agencies in order to issue permits.

Q In interpreting regulations at ARPE, who would be the final authority in deciding what was a proper interpretation?

A The administrator.

Q Would that also be true with respect to any special procedures that might be applied regarding a particular project?

A Yes, that's correct.

Q At the time these meetings were taking place that you spoke of a while ago, Mr. Motta was still the administrator, is that correct?

A Yes, correct.

* * *

[53]

* * *

Q With respect to that meeting do you recall that meeting that was held in February of 1987?

A Yes.

Q Do you recall who else was present during that meeting?

A I think that -- Well, Engineer Motta was there, Jorge Colon, I think that Engineer Cruz Marcano was present.

I think that Engineer Virgilio Gautier was there. And I can't say for sure if from ARPE's legal division Attorney

Navas was present. She was the head of the office at the time, and I couldn't say for sure if there was somebody else. I believe that Engineer Pedro Jaun Sanchez was present.

Q Let me see if I have all the names: Administrator Motta, Engineer Colon, Cruz Marcano, Virgilio Gautier, Pedro Juan Sanchez, Ramon Ayala and possibly, but you're not sure, Ms. Navas?

A What happens is that I'm not able to say for sure whether it was she personally or the attorney she had assigned to deal with the case.

MR. BLANCO: "Whose name I don't remember."

[54]

A Whose name I don't remember.

MR. NOVAS: In Spanish, the connotation is that it was not a female, but a male attorney.

BY MR. RICHICHI:

Q Do you know if any minutes were kept of that meeting?

A I wouldn't know.

Q Do you recall who led the discussion or chaired the meeting?

A Well, it wasn't a situation where anybody specifically presided over the meeting or chaired the meeting. It was a matter of everybody contributing his remarks or comments.

Q There's been some discussion in prior depositions about a term called a consensus that is involved in decision making at ARPE.

Are you familiar with that term consensus?

A Well, I know it more or less in principal.

Q Was there a consensus reached at this meeting?

A Yes, it's mentioned here.

Q In other words, what you've recorded here is what the consensus was at the meeting?

[55]

A Yes, in principal.

Q The notation that you -- withdrawn.

The notation that is referenced in item 29 indicates among other things that there was to be prepared a communication to the proponent.

Do you see where I'm at?

A Yes, that's correct.

Q Do you remember any of the discussion with respect to that communication?

A Well, in my mind I can't tell you specifically, but the agreement was to prepare a communication indicating this.

Q Was there anything else that was agreed with respect to the communication that you can recall?

A No.

Q Did if you recall did the administrator participate in that consensus?

A Yes, correct.

Q Do you know whether a communication was subsequently prepared?

A In relation to that consensus?

Q Yes.

A Yes, a communication was prepared.

Q Do you know who prepared that communication?

[56]

A Yes.

Q Who was that?

A I did.

Q At whose direction did you prepare the communication?

A Well, as part of the processing once I started with the history I would be the one to prepare most of the communications.

Q Did you do that under anyone's supervision?

A Yes, I prepared a draft. And a draft I gave to my immediate superior Engineer Jorge Colon.

Q Did Jorge Colon revise the draft in any manner?

A Yes. That was the procedure always. He would review it and if he agreed with it he would have it typed.

Q So, the fact that it would have been typed would indicate that he was in agreement with what would have been stated in the draft?

A Yes, correct; but when he would have it typed, these communications were to be signed by a third party.

In drafting the letter many times the person who drafts it since he is writing for that other

[57]

person and there are words, everyday words which that person doesn't use, that even though it had been typed as others were typed it was still a draft. So that the person who was ultimately going to sign it could agree to it before it was finally typed for his signature.

Q When it was finally typed for signature would that be done on ARPE letterhead?

A Correct. It was an official communication of the agency.

Q Do you know who else other than Jorge Colon if anyone would have seen this draft?

A I wouldn't be able to.

Q Did you discuss the draft at that time or subsequently with any other ARPE person?

A No. I finished my draft, I gave it to Engineer Jorge Colon, and I don't know if that will be the final version of it. It's a draft.

Q So, is it fair to say that after you prepared your draft and gave it to Jorge Colon you did not see the final document?

A Yes, I would see it, but once the document was issued the final work product would be received.

Q Do you know for whose signature this draft was prepared?

[58]

A Yes.

Q Who was that?

A Engineer Lionel Motta.

Q Did you see the final copy of this document?

A No.

Q Did you inquire further about it?

A No, I have no reason to do so.

Q Did Mr. Colon indicate to you what had happened to the final document?

A No, because subsequently the draft was prepared. I passed it to Jorge, and after a fairly long period of time

Engineer Jorge Colon and I learned that the letter had never been issued from the office.

Q From whom did you learn that?

A I wouldn't be able to say for sure right now.

Q Do you have any idea?

A No, I don't recall.

Q So, Jorge Colon also learned this from someone else, is that correct?

A Yes, correct.

Q Do you recall any of the circumstances under which you learned about this?

A No, I don't recall.

[59]

Q Can you say of your own personal knowledge whether, in fact, it did issue or not?

A No, specifically as to whether it was issued or not -- how was that question, please?

Q Of your own personal knowledge you do not know whether the document issued or not?

A No.

Q Your understanding is based on something that someone else told you, but you can't remember who?

A Whom I don't recall.

Q Was the preparation of this document a matter of common knowledge amongst the group of people who had participated in that meeting?

A Well, yes.

Q That would have included Mr. Marciano?

A Yes.

Q Mr. Gautier?

A Correct.

Q Pedro Juan Sanchez?

A Yes.

Q Do you know if this document was discussed in any subsequent meetings relative to the Vacia Talega project?

A No, I have no knowledge of that.

* * *

[61]

Q Did that strike you as unusual in view of the fact that a consensus had been reached at a meeting involving the administrator?

A The word isn't unusual, it's simply that it had been a directive and that basically from the standpoint of the draft I prepared, upon the communication failing to be issued from the agency it left the problem we had with the case unsolved.

Q When you say failing to issue from the agency, you mean failing to be sent to the proponents?

A Correct.

Q You mentioned it was a directive when you were selected as the person to prepare this.

Was that at the direction of the administrator?

A Not necessarily. You must remember that I was the only technician there was.

Q When you prepare your draft, would that be put on ARPE letterhead?

A No.

Q Would the document be put on ARPE letterhead before a final draft was prepared?

A It's possible.

It's put on the paper with the

[62]

letterhead when it is felt that the message contained in the document is consonant with the line of action intended to be followed. And it is up to the person who is going to sign it whether he changes it or signs it the way it is.

Q And in this instance that would have been the administrator?

A Correct.

Q At what stage in that process is a date put on the document?

A No, from the moment it's made.

Q So, when you prepared a draft you would have had a date on that?

A My draft does not bear a date, it's dated when it's typed.

Q For signature?

A Yes correct.

(Whereupon, a lunch break was had, and the following occurred back on the record:)

[63]

Q Good afternoon, Mr. Ayala. This is the continuation of your deposition. We might want to note for the record that Mr. Blanco has excused himself for the afternoon, and I believe that counsel from the Department of Justice is here present.

MS. SOTO: Also for the record purpose, my name is Miriam Soto.

BY MR. RICHICHI:

Q Mr. Ayala, before the lunch break we were chatting about a document that had been prepared, and I believe you indicated you had prepared a draft of that document.

Do you recall that general discussion that we had?

A Yes, correct.

Q Did anyone ever indicate to you whether that document had been signed by the administrator?

A No.

Q Were you ever present at my discussion amongst ARPE personnel where it was indicated that the letter had been signed?

A No.

Q Do you have any information at all as to whether, in fact, the letter was signed or not?

[64]

A No.

Q I'd like to show you what we have marked as Exhibit RA-2 for your deposition and ask you if you could read that and then I would ask a few questions about it.

I believe there's a translation by one of the certified court interpreters.

(Whereupon, Deposition Exhibit No. RA-2 was marked for Identificationas of 10-13-89.)

A Okay.

Q Have you had an opportunity to read that exhibit?

A Yes, correct.

Q Can you identify that exhibit?

A Yes, correct. It's a letter that was prepared to return the plans.

Q What is the date indicated on this letter?

A February 26, 1987.

Q Can we agree that on its face it appears to be addressed to Basora and Rodriguez regarding the Vacía Talega project and to be signed over the signature of Mr. Motta?

MS. SOTO: Objection as to his translation. It's

[65]

not to be signed over, to be signed.

MR. RICHICHI: I think to be signed over the signature of.

Q I'll withdraw the question. All I'm trying to do is make clear on the record what document we're talking about.

You would agree, would you not, that on its face this appears to be a letter prepared on ARPE letterhead dated February 26, 1987?

A Correct.

Q And the document on its face indicates that it was addressed to bBasara and Rodriguez and referenced the Vacía Talega project?

A Correct.

Q And the name that appears below the signature line on the second page is Mr. Motta?

A Correct.

Q Do you recall ever seeing this particular document prior to the date of this deposition?

A No.

Q Have you ever seen this document prior to the date of this deposition?

A This document?

Q Yes.

[66]

A Yes.

Q When did you see this document before?

A This document is a draft I prepared for the letter.

From the draft I prepared to be typed to what this document is in its final version, there are 2 paragraphs which were not a part of my draft. And they are specifically on the second page, the 5th and 6th paragraphs.

Q Do you have any information as to who added those paragraphs?

A No. The letter in its final version, this way I had never seen before.

Q So, the particular document that you have in front of you now you have never seen before, is that correct?

A No.

Q But is it fair to say that you believe this was created from a draft which you prepared with the exception of the 2 paragraphs which you referenced?

A Correct.

Q Does this document as you see it, appear consistent with what was agreed to as the consensus at that February 1987 meeting?

* * *

[76]

* * *

Q Was there something you need to finish?

A Because since 1986 when I first became involved with the project when I prepared the history of the case where the only two sets of plans there were were similar to this one, from that time on my intervention as a technician in the evaluation of the case already establishes what is contained in the letter on the second

[77]

page in the third paragraph.

Q You're pointing to which letter?

A The one dated February 26 of 1987.

Q And for the record that appears to be Exhibit 2 to your deposition.

A Where it is established that the plans do not include the details required in a construction plan for urbanization works.

Q Having reviewed and looked at these plans in greater detail a little while ago, do you believe that these plans that are made as Exhibit 3 to your deposition are representative of anteproyectos for buildings?

A It's possible.

Q Well, are you saying it's possible or are you saying that, in fact, would be representative of anteproyectos for buildings?

A I say it's possible because anteproyectos could also have more information than the one this has.

Q But in your view, is there sufficient information in these documents for them to be considered anteproyectos for buildings?

A That might be.

Q Is there any doubt in your mind?

A No, there aren't any.

[78]

* * *

Q When you said -- You mentioned in a prior response something about one of the reasons why ARPE returns it, to what period are you referring to in terms of the return?

A I'm referring to the filing of these plans in 1982.

Q So, what you're saying is these plans that we've marked as Exhibit 3 were returned in 1982?

A In 1982 the Basora and Rodriguez firm files with ARPE some plans for preliminary development.

[79]

And according to the documents in existence, they also at that same time submitted some construction plans. The plans presented in preliminary development are returned to the Basora and Rodriguez firm. The other plans are sent to the Carolina regional office.

From the standpoint of what these plans are, which have characteristics of anteproyectos rather than of construction plans, preliminary development returns one phase. This is the one that goes to Carolina. And from the standpoint the contents of a plan, it did not satisfy the criteria for a construction plan for urbanization works.

Q Now, upon what do you base those conclusions?

A The conclusion regarding the return of the documents?

Q Yes.

A There's a communication by Engineer Jorge Colon where he returns the plans that had been presented.

Q It's not based on your personal knowledge, it's based on what you've seen in the documents?

A Yes, if I remember correctly.

* * *

[80]

* * *

Q Have you had an opportunity to read the Exhibit RA-4 to your deposition?

A Yes.

Q Does this appear on its face to be a letter on ARPE letterhead dated December 16, 1988?

A Yes, correct.

Q And this appears to be addressed to Basora and Rodriguez and signed by Rene Rodriguez, administrator of ARPE?

A Correct.

Q And the subject of this letter from its face again is the Vacia Talega project?

A Correct.

Q Prior to the date of this deposition, have you ever seen that December 16, 1988 letter before?

A No.

[81]

Q Did you participate in any manner in the preparation of this letter?

A No. I was present at a meeting where the subject of what the duration of a project in general terms was, but I had no intervention as to this specific letter.

* * *

[83]

Q Have you ever had an opportunity to discuss this December 16, 1988 letter with anyone other than perhaps counsel?

A No, it's the first time. I hadn't seen it. That is the first time I see it.

Q If I could direct your attention to the third page of the document, there are some initials in the lower left-hand corner.

Do you see where I'm at?

A Yes. The initials here on the left-hand side?

Q Yes. Do you have any understanding of whose initials those would be?

A No.

Q Was there any sort of practice at ARPE where the initials of the author or authors of a document would be put at the end?

A Yes, that's correct.

Q Well, the reason I ask that is the first 3 initials are RAR.

Based on your experience at ARPE, can you say whether you believe that to be Rene Rodriguez?

A That could be so.

Q Do you have any idea who CIC would be, which

[84]

is the next 3 initials?

A No.

* * *

[85]

* * *

Q In the first paragraph of this letter Mr. Colon references a February 22, letter of that year in which Mr. Rodriguez had submitted some drawings, is that correct?

A Correct.

Q Does it appear from the letter that Mr. Colon is describing two different types of drawings which were submitted?

[86]

A Correct.

Q As you understand it, what are the two types of drawings or sets of drawings which Mr. Colon is referring?

A The way I see it, it was two types of plans. One for an anteproyecto with the characteristics that an anteproyecto has. And another one for urbanization works.

Q So, Mr. Colon is referencing two types of sets of drawings, if I understand you right. The first is anteproyectos for buildings, is that correct?

A Correct.

Q And the second type of drawings to which he's referring are construction plans for urbanization works?

A Correct.

* * *

[87]

* * *

Q With respect to the construction plans for urbanization works referred to by Mr. Colon in his letter, do you believe that those are different than the drawings which you had inspected that are marked as RA-3 to your deposition?

A Well, I have not seen the other ones, but this one is not a plan for urbanization works.

Q Do you know Mr. Colon personally?

A Yes.

Q And you have worked with him professionally for many years?

A Correct.

Q Do you believe he is a competent engineer?

A Yes, very competent.

Q Do you believe he would confuse these drawings that we've marked as RA-3 with construction drawings for urbanization works?

A Never.

Q In light of that, do you believe that that when he referred to the construction plans for urbanization works on that first paragraph he was not

[88]

referring to Exhibit RA-3?

* * *

Q Based on what Mr. Colon has represented in his letter and your knowledge of him and his competence and your own review of Exhibit RA-3, do you believe that the construction drawings or construction plans for urbanization works that he references in the first paragraph of his letter are not the same as RA-3?

A Correct.

Q We can agree, can we not, that it appears from Mr. Colon's letter that the construction drawings which he referenced in the first paragraph were sent on to the Carolina office, is that correct?

A Correct.

Q Can we also agree that based on his letter it would appear that the preliminary project plans -- I'll withdraw that.

We also agree that based upon his letter it appears that the drawings represented by Exhibit RA-3 are not the drawings which he indicated were sent on to the Carolina office as construction drawings?

[89]

A That could be.

Q Why do you say that could be?

A Because it is Jorge Colon who has to say whether these are the ones he sent or not because he had a chance to see both of them and was the one who decided what went to one place and what went to the other.

Q Did you ever have any discussions with Jorge Colon as to whether whether, in fact, the drawings represented by RA-3 were the construction drawings for urbanization works referenced in his letter?

A Repeat the question.

Q Did you ever have any discussions with Mr. Colon as to whether the drawings represented by Exhibit RA-3 were the construction drawings for urbanization works which he had referenced in his letter?

A Not in that sense.

Q Did you have any discussions with him in any other context about that?

A Well, yes. When my involvement with the plans begins and I prepared that famous history, it is established therein that the plans that Engineer Juan Morales had at the Carolina office when he came over to the central level, are not construction plans for urbanization works.

[90]

I have never had -- It has never been mentioned whether these are the ones he sent as being construction plans. That has never been discussed.

Q By "these" you mean Exhibit RA-3?

A Correct. Which is the only plan that exists as a documentation in the agency in the study of the project.

* * *

[92]

* * *

Q I believe you had already indicated earlier in the deposition that -- Let me ask you this: This history that you prepared, was there an earlier draft of that that was prepared prior to 1987?

A Yes.

Q Do you recall approximately when you prepared that earlier draft summary?

A No. When I prepared my history there's a history that had been prepared before. I don't know who did it.

We took that history and improved on it and updated it to the situation of the project at the time.

[93]

Q So, you do not know who prepared that earlier history?

A Early one, no.

Q Earlier in the deposition did you indicate that you had examined these plans as a technician and found some deficiencies?

A I didn't say that.

Q I believe you had indicated that -- Drawing your attention to the February 26, 1987 letter we've marked as Exhibit RA-2 to your deposition, did you indicate previously that you had discovered some deficiencies that were referenced in that letter?

A Correct.

Q Do you recall when you first discovered those deficiencies?

A Yes. When we started to deal with the history part of the analysis in preparing the history was to make a verification of the documents submitted and the plans were part of those documents.

And I clarified that it was not a review of the plan because the intention was not to review them. And that in the evaluation we performed with the plans that had been presented it wasn't possible to do a good processing of them because they did not

[94]

fulfill the minimum requirements.

Q Did anyone ever indicate to you that the construction drawings for urbanization works for Vacia Talega had been lost?

A No.

Q Did anyone ever indicate to you that those construction drawings for urbanization works had been misplaced?

A No.

Q Were you ever a party to any discussions with representatives of ARPE at which the issue of whether the construction plans for urbanization works had been lost or misplaced was discussed?

A No.

Q Do you know where the other three copies of the plans which you reviewed -- Let me withdraw that.

I'm not sure you indicated that you reviewed them. I believe you indicated that in 1986 that you believe there were one or two copies of the sets of the plans that we had marked as RA-3 in the Vacia Talega file, is that correct?

A Correct.

Q Do you know or have any personal knowledge as to where the other sets of plans that would have been

[95]

submitted went?

A What other sets of plans do you mean?

Q I believe you indicated earlier that 4 or 5 sets have plans would have been ordinarily submitted. Let me withdraw that.

I believe you indicated earlier that if a set of construction plans for urbanization works was submitted, you indicated it was customary to submit 4 or I believe you indicated earlier that it was customary to submit 4 or 5 copies of a set of drawings for construction plans for urbanization works when they were submitted; is that correct?

A That is not correct.

Q What number of copies of plans would be submitted?

A What I said was that the project developers would present two copies so that ARPE technicians could mark those copies in red.

Then, after obtaining the endorsements from all of the agencies they would present 5 copies for final approval.

Q Was it ARPE's practice not to accept 5 copies unless the approvals had been obtained?

A There wasn't any specific form it had

[96]

established because it was the decision of the project developers themselves who would for economic reasons who would present two copies of the plans to be marked. And it could also have been 3, 4, 5 copies.

* * *

Q Does this appear to be an August 2, 1988 letter on ARPE stationery from Cruz Marciano to Engineer Luis Rodriguez?

A Correct.

Q The subject is the Vacia Talega project?

A Correct.

Q And attached with it appears to be some sort

[97]

of a message or transmittal slip, is that correct?

A Correct.

Q I'll represent to you that my questions are only directed at the first page, which is Mr. Marciano's letter.

Have you ever seen this letter prior to the date of this deposition?

A No.

Q Do you believe you participated in the drafting of this document?

A No.

Q No, you do not believe you participated?

A Not in the drafting since this project fell within what was included in project review, resolution P 139, which is the resolution under which this type of plans were evaluated.

This resolution was discussed at one time, and it being the resolution which covered the project basically.

Q You say that was discussed at one time. Do you recall when that was?

A I don't recall specific dates.

Q Do you recall who was present when it was discussed?

[98]

A Yes it was Engineer Pedro Juan Sanchez, it was Engineer Virgilio Gautier and myself.

Q Any other people that you can recall?

A No, I don't think so.

Q In what context did those discussions occur?

A Yes. In the context of what constituted the presentation of this type of project.

And that the presentation of plans of a preliminary nature indicated thorough.

It failed to extend the effectiveness of any project.

Q In those discussions was the reference made to drawings, the set of drawings that we've marked as RA-3?

A Not necessarily.

Q Was reference made to some other drawings?

A No. Reference was made to plans that did not contain full details of urbanization works.

* * *

[99]

* * *

Q This August 2, 1988 letter references preliminary project plans.

Are you able to say whether the preliminary project plans referenced in that letter are the same preliminary project letter referenced in the document we've marked as Exhibit RA-3?

A It's possible because these were the only plans we had -- that ARPE had in its possession.

[100]

Q Did ARPE consider these to be -- I withdraw that.

Did ARPE consider RA-3 to be the construction plans for urbanization works which Mr. Rodriguez had submitted because they were the only plans that were in the file?

A Well, because they were the only plans that were in Carolina according to the letter from engineer Jorge Colon.

And they are the plans that Engineer Juan Morales when he comes back to the central office brings with him as being what he has over there for his study.

Q With that explanation, are you saying that ARPE considered the plans that are reflected in RA-3 to be the construction drawings for urbanization works which Mr. Rodriguez had submitted because they were the only plans which were contained in the file?

A Correct.

Q Is that what you understood me to say?

A Yes, but that has to be clarified. It's not that it's the only plan in the file, but rather that that is the plan that the Carolina office had.

And when the review of these projects

[101]

is transferred to the central office, this set of plans is what that office had to study this project.

Q By "this set of plans" you're referring to RA-3, is that correct?

A Yes correct.

Q Those are the only plans you had in the file, correct?

A Correct.

Q And in view of what you just described, ARPE considered these to be the construction plans for urbanization works which Mr. Rodriguez had submitted?

A Correct.

* * *

[103]

* * *

Q The document which has been marked as Exhibit RA-8, does that appear to be a set of drawings?

A Correct.

Q Based upon your brief review of the documents here, how would you characterize those drawings?

A Well, it's a plan that contains details of urbanization works. And from briefly reviewing it, I consider it to be an advanced copy.

Q Was this set of plans which you have in front of you ever considered by ARPE in any evaluation that you're aware of of the Vacia Talega project?

A Not by me, no. I had never seen it.

Q Do you know whether anyone else ever performed any sort of analysis of these drawings on

[104]

behalf of ARPE?

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.	}	CIVIL NO. 87-01915 (HL)
Plaintiff,		
vs.		
RENE ALBERTO RODRIGUEZ, et al.		
Defendants.		

EXCERPTS FROM THE DEPOSITION OF
AGNES NAVAS AND CARMEN CHIQUES
(OCTOBER 25, 1989)

[28]

* * *

MR. BLANCO: This is Attorney Blanco speaking on behalf of the defendant. Reference has been made in various depositions in the course of this case to what is known as the special case file.

MR. RICHICHI: Or special projects file.

MR. BLANCO: The record should show that today what is known as the special case or special projects file has been produced for the plaintiffs' inspection and copying.

This file has been presented in its entirety with the exception of a number of documents which I shall briefly describe at this time. There there is a letter dated May 14, 1987 from Aida Ileana Oquendo Graulau to AMadeo Francis.

Both of these people are aides to the governor. Both of them work for the governor's mansion,

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.	}	CIVIL NO. 87-01915 (HL)
Plaintiff,		
vs.		
RENE ALBERTO RODRIGUEZ, et al.		
Defendants.		

EXCERPTS FROM THE DEPOSITION OF LUIS
RODRIGUEZ (OCTOBER 26, 1989)

* * *

[140]

* * *

Q Did you ever present such a plan to the Environmental Quality Board?

A No, it was not submitted.

* * *

[142]

* * *

Q Did you ever submit copies of the construction plans to the Electric Energy Authority of Puerto Rico for their endorsement?

A For their endorsement, no, they weren't submitted.

* * *

[146]

* * *

Q How does an agency express an endorsement?

A If we use endorsement as approval, it usually takes the form of a letter and a sealed plan.

Q When you say sealed plan, do you mean a plan that has the seal of the agency?

A That's correct.

* * *

[147]

* * *

Q Well, just to clear this up once and for all, this date as of today October 26, 1989 have you received an endorsement for this project from the Puerto Rico Electric Energy Authority?

A No.

* * *

[149]

* * *

Q Let me ask you have you as of this date received an endorsement from any agency which would be required for this project?

MR. RICHICHI: Objection.

A No, for the same reason that I've just

[150]

explained.

* * *

Q At this time I would like to show you a document.

I'm showing you a document which shall be marked LR-E for purposes of this deposition, which on its face appears to be a letter on ARPE stationery from Engineer Juan A. Maldonado to Basora and Rodriguez dated May 22, 1984.

Do you have that document in front of you?

A Yes.

* * *

[153]

* * *

Q In your understanding of this letter, does this letter require any response from you or requests any response from you?

A No. The letter just requires that receipt of it be acknowledged and that we inform them concerning the preference concerning what is stated in the letter.

However, we would like to point out that this is a circular type letter where obviously our firm name has been insert and perhaps hundreds of these letters were sent.

Q Did you respond to this letter?

A No, we didn't reply because we didn't think it was necessary to reply to it since it established some options.

[154]

* * *

Q Well, does the letter request from you to inform ARPE of your preference?

MR. RICHICHI: The same objection as before. If we're going to talk about his understanding, I withdraw the objection.

A Yes, the letter states that we should inform our preference.

BY MR. BLANCO:

Q Did you inform ARPE of your preference —

A No.

* * *

[155]

* * *

Q Sir, why did you not respond to this letter?

A Because we understood that in not replying we would continue under the old rules.

Q When you say we who do you mean?

A I refer to our firm.

Q Basora and Rodriguez?

A Basora and Rodriguez.

Q On what do you base that understanding?

A Simply because we think it's that way.

* * *

[161]

* * *

Q In your opinion this is not a final construction plan?

A No, it's not a final construction plan.

* * *

[170]

* * *

Q Prior to your submitting or after you submitted these plans in February of 1982, did you address any written communication to ARPE before January 27, 1986 concerning this project?

A No.

* * *

Q Did you have any communications with ARPE personal between February of 1982 and January of 1986 in a non-written form?

[171]

A Yes. I indicated before that I made attempts concerning the status of the case in personal contact concerning the status of the case.

Q I believe you mentioned the Carolina regional office?

A Correct. And the central office of ARPE also.

* * *

[177]

* * *

Q And throughout this time between February of 1982 and up to the beginning of 1986, were you satisfied that ARPE was dealing with the case?

A No, I wasn't satisfied. There may have been some trouble.

* * *

[178]

* * *

Q Did your knowledge of this profession and your experience in this profession, how long do you think it should have taken ARPE to process those plans?

And I want to make sure I'm referring to these plans in this project that we're dealing with in this case.

A I think that based on the complexity of the case, ARPE could have taken 4 to 6 months to give comments on the case.

* * *

[179]

* * *

Q What, if anything, occurred in January of 1986 that provoked you to write this letter?

A We got tired of waiting. Our patience had been exhausted.

* * *

[180]

* * *

Q Did you receive any instructions from your clients to proceed in any manner between February of 1982 and January of 1986?

A No. The clients just told us to continue giving personal follow-up to the case.

Q Would it be fair to state that your clients also waited patiently throughout all this time?

A I really couldn't think for him, but it would seem to me that he was following our recommendations.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.

Plaintiff,

vs.

RENE ALBERTO RODRIGUEZ,
et al.

Defendants.

CIVIL NO. 87-01915 (HL)

EXCERPTS FROM THE DEPOSITION OF
AGNES L. NAVAS DÁVILA (NOVEMBER 1, 1989)

[114]

* * *

MR. RICHICHI: That document was identified months ago as was requested in writing --

MR. BLANCO: That's right. As a matter of fact, the record should show that it had been produced months ago but the original was shown to you last week. What appears to be the original on original type --

* * *

[115]

* * *

MR. RICHICHI: Well, that file in which you allege this document was originally contained was not produced for us until last week and it is still a mystery to me why we had to wait until last week to get it.

MR. BLANCO: I am sorry, but this document you got months ago. You did not have to wait 'till last week. You might have had to wait for last week to see what appears to be the original but this document you have had in your hands for months. The same holds true for at least 95 percent of the documents in the special projects file.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.	}	CIVIL NO. 87-915 (HL)
Plaintiff		
vs.		
RENE RODRIGUEZ, ET AL.		
Defendants		

MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE COURT:

COME NOW defendants René Rodríguez and the Rules and Permits Administration of the Commonwealth of Puerto Rico, through the undersigned attorneys, and very respectfully request from this Honorable Court to move for summary judgment pursuant to Rule 56 of the Federal Rule of Civil Procedure.

1. The present motion is based on the ground that defendant René Rodríguez is entitled to qualified immunity.
2. In Support of this Motion, defendants will submit pursuant the Local Rules of this Court, and within the next five (5) days, that is until November 22, 1989, the following:
 - a) Statement of Material Facts as to which there is no genuine issue in controversy together with supporting documents.
 - b) Memorandum of Law together with supporting documents.
3. According to the undisputed material facts and the state of the law, defendants are entitled to summary judgment. Furthermore, defendants are entitled to a stay of procedures and postponement of trial until the threshold issue of qualified immunity is resolved at the appellate level, if denied.

WHEREFORE, defendants respectfully move for summary judgment in their favor together with an award of costs and attorney's fees. In addition, it is requested that the Court stay all proceedings until summary judgment is entered. If denied, it is requested from the Court to stay proceedings until such time as the threshold issue of qualified immunity is resolved at the appellate level. Defendants further request an extension of five (5) days to submit the above-mentioned documents in support of their motion for Summary Judgment.

I HEREBY CERTIFY THAT on this same date a true copy of this document has been sent by mail to: JOSE LUIS NOVAS DUEÑO, ESQ., Suite 1130, Banco Popular Center, Hato Rey, Puerto Rico 00918 and THOMAS RICHICHI, KATHERINE SZMUSKOVICZ, ESQS., Beveridge & Diamond, Suite 700, 1350 I Street, NW, Washington, D.C. 20005.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 15th day of November, 1989.

HECTOR RIVERA CRUZ
Secretary of Justice

CARLOS E. RODRIGUEZ QUESADA
Director
Federal Litigation Division

BY:
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SIGNATURES OMITTED IN PRINTING

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

PFZ PROPERTIES, INC.	}	CIVIL NO. 87-915 (HL)
Plaintiff		
vs.		
RENE RODRIGUEZ, ET AL.		
Defendants		

**MOTION TO DISMISS AND
BRIEF IN SUPPORT THEREOF**

TO THE HONORABLE COURT:

COME NOW defendants, through the undersigned attorneys and very respectfully move this Court to dismiss the Amended Complaint filed in the instant case on the following grounds:

- a) THE ACTION AGAINST ARPE IS BARRED PURSUANT TO THE ELEVENTH AMENDMENT.
- b) THE ACTION AGAINST RENE RODRIGUEZ, IN HIS OFFICIAL CAPACITY, IS BARRED PURSUANT TO THE ELEVENTH AMENDMENT.
- c) THE COMPLAINT FAILS TO STATE A COGNIZABLE CLAIM UNDER 42 USC §1983.
- d) THE PRESENT ACTION IS TIME-BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

* * *

[19]

WHEREFORE, it is respectfully requested that this Court grant defendants' Motion to Dismiss and or that the present action be dismissed.

I HEREBY CERTIFY THAT on this same date a true copy of this document has been sent by mail to: JOSE LUIS NOVAS DUEÑO, ESQ., Suite 1130, Banco Popular Center, Hato Rey, Puerto Rico 00918 and THOMAS RICHICHI, KATHERINE SZMUSKOVICZ, Beveridge & Diamond, Suite 700, 1350 I Street, NW, Washington D.C. 20005.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 15th day of November, 1989.

HECTOR RIVERA CRUZ
Secretary of Justice

CARLOS E. RODRIGUEZ QUESADA
Director
Federal Litigation Division

BY:
LUIS N. BLANCO MATOS
Attorney
Federal Litigation Division
Department of Justice
P.O. Box 192
San Juan, Puerto Rico 00902
Tel. 721-2900 — Ext. 462

SIGNATURES OMITTED IN PRINTING

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.,

Plaintiff,

v.

RENE ALBERTO RODRIGUEZ,
individually,

SALVADOR ARANA,
in his capacity as
Administrator of the
ADMINISTRACION DE
REGLAMENTOS Y PERMISOS,
and the ADMINISTRACION DE
REGLAMENTOS Y PERMISOS,

Defendants.

CIVIL NO. 87-01915 (HL)

DECLARATION OF JACK KATZ

Pursuant to 28 U.S.C. § 1746 the undersigned, Jack Katz, makes the following declaration.

1. I am the president of PFZ Properties, Inc. which is the proponent of a development known as the Vacía Talega project (Case No. 71-093 Urb). The Vacía Talega project is to be constructed on property which PFZ has owned since 1960 and which was approved for development, upon application by PFZ, pursuant to a resolution and order of the Planning Board of The Commonwealth of Puerto Rico in 1976.

2. In September 1986, while our project was pending before ARPE, PFZ was invited to make a presentation regarding the Vacía Talega project during a meeting at ARPE which was chaired by Administrator Lionel Motta and attended by the heads of seven (7) agencies of the Puerto Rico government. PFZ was represented at the meeting by myself

and Luis Rodriguez of the firm of Basora & Rodriguez, which has served as the engineering/architectural consultant for PFZ on the Vacía Talega project.

3. PFZ made a presentation at the meeting on September 9, 1986 and at the conclusion of our presentation, we were excused from the meeting and advised that we would promptly be apprised of the status of our project.

4. No opposition was expressed to the project at the meeting and no concerns were raised regarding the construction drawings for urbanization works which we had submitted years before.

5. In the months which immediately followed the meeting, however, we received no formal written communication from ARPE regarding the Vacía Talega project.

6. Following the retirement of Administrator Motta in February 1987, I became aware of reports in the newspapers indicating that political efforts were being made to prevent the development of the Vacía Talega project.

7. In the summer of 1987 I was made aware of unsuccessful efforts by PFZ's consulting engineers, Basora & Rodriguez to obtain information from ARPE as to the status of the pending Vacía Talega project.

8. On October 8, 1987, Basora & Rodriguez wrote to René Rodriguez, the then Administrator of ARPE to inquire as to the status of the Vacía Talega project. No reply was received to the inquiry.

9. In November of 1987 newspaper reports appeared quoting the Governor of Puerto Rico as stating that he had given the agencies instructions to do something special in Vacía Talega.

10. Also, in November 1987, PFZ, through its engineers, attempted to file Preliminary Project Plans ("anteproyectos") with ARPE for the Vacía Talega project.

11. I was advised by Basora & Rodriguez that the Preliminary Project Plans were refused for filing on the orders of Pedro Juan Sanchez, the Deputy Administrator of ARPE, who had told our consultant that the plans could not be filed.

12. Concerned at these events, unable to receive any information from ARPE, and cognizant of the fact that PFZ had not yet been advised of the results of the September 9, 1986 meeting chaired by the former Administrator, I contacted the Governor's office to inquire whether they could determine the status of the Vacía Talega project.

13. A few days thereafter, I received a phone call from La Fortaleza advising me that the Governor's Special Aide, Amadeo Francis, was handling the Vacía Talega project. In addition, I was invited to attend a meeting at Mr. Francis' office at La Fortaleza regarding the project.

14. On December 9, 1987 I met with Mr. Francis at his office at La Fortaleza.

15. Mr. Francis advised me that he was handling the Vacía Talega matter and could advise me of what was happening with our project. Francis further indicated that even though he thought Vacía Talega was a good project, it was in trouble due to political considerations.

16. Mr. Francis described the political considerations, explaining that each of these related to the fact that the Governor's environmental record had been criticized and his political opponents were publicly exploiting the issue of development in Vacía Talega to his political disadvantage. In particular he noted that the leader of an opposition party, Ruben Berrios, had sponsored a bill in the Senate (Senate Bill 320) to prevent the project development by expropriating the land in Vacía Talega for public use. However, Mr. Francis noted that he believed that the Commonwealth did not have the funds to accomplish this expropriation. Further, a political force within the Governor's own party and a potential rival in the next Governor's race, Victoria Munoz Mendoza,

was a co-sponsor of the Senate bill and had taken a public position against the Vacía Talega development. Finally, the Governor was concerned about the recent public perception that he had poorly handled the development of another project on the southern coast of Puerto Rico (Club Med), and the Governor was anxious to make amends for his perceived failure there.

17. Mr. Francis informed me that the Governor was receiving option reports from nine sources and would make a decision on a course of action by February. He further stated that due to the pressure the Governor was receiving as a result of the political situation, the Vacía Talega project would not be decided on its merits, but on the basis of the political considerations.

18. On December 28, 1987, PFZ filed suit to compel ARPE to process its plans in accordance with due process of law.

19. Thereafter, on August 2, 1988, PFZ was advised by letter from ARPE that its project had been denied for technical reasons associated with its Construction Drawings. However, it was apparent from the communication that ARPE had not reviewed PFZ's Construction Drawings, but instead another set of entirely different drawings known as "Preliminary Project Plans," which by their nature, could not possibly have been confused with Construction Drawings.

20. PFZ promptly advised ARPE that it had reviewed the wrong drawings by letter of August 17, 1988 and sought reconsideration, identified the actual Construction Drawings it had submitted, and asked that they be reviewed.

21. By letter of December 16, 1988 signed by the defendant René Rodriguez, ARPE denied the request for reconsideration, premised upon a review of the same drawings it had reviewed earlier, despite PFZ having specifically informing ARPE that they had reviewed the wrong drawings.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 18th day of December, 1989.

SIGNATURE OMITTED IN PRINTING
Jack Katz

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.	}	CIVIL NO. 87-01915 (HL)
Plaintiff,		
vs.		
RENE ALBERTO RODRIGUEZ,		
et al.		
Defendants.		

DECLARATION OF LUIS M. RODRIGUEZ LEBRON

Pursuant to 28 U.S.C. 1746 the undersigned, Luis M. Rodriguez Lebron, makes the following declaration:

1. My name is Luis M. Rodriguez Lebron. I am a partner of the engineering, architecture, development and planning firm of Basora & Rodriguez, which is located at 701 Ponce De León Avenue, San Juan, Puerto Rico 00907. I have been a partner of Basora & Rodriguez since 1960.

2. PFZ Properties, Inc. is the proponent of the Vacía Talega project, which project is the subject of the above-captioned lawsuit.

3. Basora & Rodriguez was engaged by PFZ properties, Inc. to render the planning, development, engineering and architectural services required for the project.

[2]

4. At Basora & Rodriguez I am the partner in charge of the Vacía Talega project since its inception.

5. I am a licensed professional engineer since 1950 and through the professional partnership of Basora and Rodriguez I have practiced my profession since 1960. From 1950 to 1958 I worked for the Planing Board and since 1960 I have

practiced my profession before the Planing Board and before ARPE since the agency was created in 1975.

6. That on February 22, 1982, I filed with ARPE five sets of plans entitled "Construction Drawings for Urbanization Works" for the Vacia Talega Project. The filing of said plans was made pursuant to the February 23, 1981 ARPE Resolution.

7. The "Construction Drawings for Urbanization Works" were not submitted to ARPE as "advance copies" but officially filed with ARPE as construction plans.

8. The "Construction Drawings for Urbanization Works" were filed together with a cover letter and other drawings entitled "Preliminary Project Plans".

9. By virtue of my many years in the active practice of my profession I am familiar with the practices and procedures which ARPE applied to pending cases or projects, among others, to those relative to the review of construction drawings for urbanization works filed with ARPE prior to the adoption of the Certification Law in 1975 and the effective date in 1984 of the Certification Regulations

[3]

that made applicable to construction drawings for urbanization works the certification procedures.

10. Under the pre-certification rules, procedures, practices and customs as effective and applied at the time the "Construction Drawings for Urbanization Works" were filed and which were applicable to their review and processing by ARPE until their final approval or rejection, the review by ARPE of such drawings was accomplished as follows:

- a) The proponent's engineer filed with ARPE the Construction Drawings for Urbanization Works".
- b) ARPE would review the technical aspects of the drawings to insure that they complied with the applicable regulations in force.

- c) ARPE would notify the proponent's engineer of any deficiencies or corrections.
- d) The proponent's engineer and ARPE would discuss the deficiencies and corrections as noted by ARPE.
- e) The proponent would proceed according to ARPE's requirements and correct the drawings as necessary.
- f) The corrected drawings would be submitted by the proponent's engineer to ARPE for further revision.
- g) The process would be repeated as required on a continuous manner until the drawings would receive final approval from ARPE.

11. The review process was not at the relevant times a "pass or fail" procedure but a continuous "back-and-forth" process of technical exchanges between the proponent's engineer and ARPE.

[4]

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Juan, Puerto Rico this 18th day of December, 1989.

Luis M. Rodriguez Lebron

SIGNATURE OMITTED IN PRINTING

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.,

Plaintiff,

v.

RENE ALBERTO RODRIGUEZ,
individually and
SALVADOR ARANA,
in his capacity as
Administrator of the
ADMINISTRACION DE
REGLAMENTOS Y PERMISOS,
and the ADMINISTRACION DE
REGLAMENTOS Y PERMISOS,

Defendants.

CIVIL NO. 87-1915 (HL)

DECLARATION OF REGINO RODRIGUEZ LEBRON

Pursuant to 28 U.S.C. & 1746 the undersigned, Regino Rodriguez Lebron, makes the following declaration.

1. My name is Regino Rodriguez Lebron. I am an employee of the engineering, architecture and planning firm of Basora & Rodriguez, which is located at 701 Ponce De León Avenue, San Juan, Puerto Rico 00907. I have been employed by Basora & Rodriguez since 1963.

2. Basora & Rodriguez is the engineering firm for the proponent of the Vacía Talega project that is the subject of the above-captioned lawsuit.

3. My duties at Basora & Rodriguez include, among others, submitting to the Administración de Reglamentos y Permisos ("ARPE") documents prepared by the firm.

4. On November 17, 1987 at 2:30 P.M. I went to ARPE to file preliminary project plans for structures for the Vacía Talega project. When I arrived at ARPE to file the plans, the ARPE employee on duty at that time did not accept the plans because ARPE's Form No. 15.13 was not properly completed. At 3:40 P.M. I returned to ARPE's filing office with the documents and Form No. 15.13 completed in the manner requested. The ARPE employee on duty at that time, Mr. Angel Pérez again examined the documents, this time in full. He indicated to me that he had to consult about something and went to the offices of the technicians. Upon returning to the filing office, Mr. Pérez told me that he could not receive the case for filing because of instructions received from Engineer Pedro Juan Sánchez, who at that time was the Deputy Administrator of ARPE. The instructions were based upon recently published newspaper articles related to the development of the Vacía Talega-Piñones area.

5. Thereupon I requested to meet with Eng. Sánchez.

6. When I discussed the matter with Eng. Sánchez I expressed surprise about the instructions and asked whether there was an official ARPE communication supporting his instructions to Mr. Pérez. Engineer Sánchez indicated to me that such official ARPE communication did not exist. Thereupon Eng. Sánchez made a telephone consultation with the then Director of ARPE, Eng. René A. Rodríguez and thereafter told me that the documents, although not filed, could stay at the filing office and that the next day, after meeting with the Director, he would let us know the action to be taken with the case.

7. The next day I went to see Mr. Pérez, who had no instructions from Mr. Sánchez. I then went to Mr. Sánchez who advised me that the only instructions were to leave the documents, unfiled, at the filing office until he and the Director of ARPE, René A. Rodríguez, had an opportunity to make a detailed study of the case.

8. At no time was I able to obtain from ARPE a receipt for the documents nor any evidence that the documents were at ARPE.

9. The next day, Thursday the 19th, was a holiday. On Friday I went to ARPE during the morning to see Mr. Sánchez, but he was unavailable because he was meeting with the Administrator. I took the documents from the filing office and returned during the afternoon to attempt filing again. Mr. Pérez again refused to receive the documents for filing. Since I could not file nor even obtain a receipt for the documents, I mailed the documents to ARPE to the attention of the Director by certified mail, return receipt requested.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Juan, Puerto Rico this 18th day of December, 1989.

SIGNATURE OMITTED IN PRINTING
Regino Rodríguez Lebron

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.,
Plaintiff,

v.

RENE A. RODRIGUEZ,
et al.,

Defendants.

CIVIL NO. 87-1915 HL

OPINION AND ORDER

This case concerns a dispute over a residential and tourist development project in an area known as Vacía Talega in Loiza, Puerto Rico. Plaintiff PFZ Properties, Inc. ("PFZ") brought the present action claiming that the Puerto Rico Regulations and Permits Administration (hereinafter called by its Spanish acronym "ARPE") and its former administrator, Rene Alberto Rodriguez ¹, deliberately delayed and failed to process certain construction drawings for site improvements submitted by PFZ to ARPE in February 1982. PFZ brings this action under the Civil Rights Statute, 42 U.S.C. Section 1983, alleging that defendants have violated its procedural and substantive due process rights and equal protection of the laws. Defendants move to dismiss this action on various grounds. As a result of our conclusion, we only address the

¹ Codefendant Rodriguez was the Acting Administrator of the Regulations and Permits Administration from March 1, 1987 until he was appointed Administrator on September 2, 1987. He held the position of Administrator until February 20, 1989. At the time of this lawsuit was filed, Rodriguez was the Administrator of ARPE. Since Rodriguez is no longer at ARPE, he has been replaced by Salvador Arana as the current Administrator of ARPE. Pursuant to Federal Rule of Civil Procedure 25(d), Salvador Arana automatically shall be substituted as a party in his official capacity as Administrator of ARPE. However, Rodriguez shall remain as a defendant in his individual capacity.

issue of whether PFZ has stated a cause of action under Section 1983.²

I. FACTS

In deciding defendants' motion to dismiss, the Court accepts the allegations in the amended complaint as true and views them in the light most favorable to plaintiff PFZ. *SCHEUER v. RHODES*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974); *MORALES BORRERO v. LOPEZ FELICIANO*, 710 F.Supp. 32,33 (D.P.R. 1989).

Since 1960, PFZ owns 1,358.65 "cuerdas"³ in Vacía Talega. Some years after its purchase of the land, PFZ applied to the Puerto Rico Planning Board⁴ to develop the land into 4,000-unit residential and tourist complex. Following extensive review and hearings, the Planning Board finally

²Defendants also contend in their motion to dismiss that the action is time barred and that the Eleventh Amendment immunity bars this action. We find that these arguments are without merit and they will not be addressed. Thus, the Court only addresses the issue of whether PFZ has stated a cause of action. Since the Court concludes that PFZ does not have a cause of action under Section 1983, the issue of qualified immunity raised in defendants' motion for summary judgment need not be discussed. Likewise, there is no need to rule on the executive privilege raised by defendants when PFZ sought to depose two Governor's aides. See Motion to Alter or Amend Order and Request for Stay of Proceedings, and plaintiff's Opposition, Docket numbers 61 and 63.

³A "cuerda" is a Spanish measure equivalent to 0.97 acre. VELAZQUEZ, *Diccionario de los Idiomas Ingles y Español* 193 (1973); *CULEBRAS ENTERPRISES CORP. v. RIVERA RIOS*, 813 F.2d 506, 508 (1st Cir. 1987).

⁴The Puerto Rico Planning Board was created for the general purpose of "guiding the integral development of Puerto Rico" that will best promote the general welfare of the present and future inhabitants. The Planning Board is responsible for setting policies in the areas of development, distribution of population, use of the land and other natural conditions in Puerto Rico. 23 L.P.R.A. sec. 62c.

approved PFZ's project on May 14, 1976 ("the 1976 Planning Board Resolution").⁵

On August 24, 1978, PFZ timely submitted to ARPE plans for the internal preliminary development of blocks for the first section of the project, as required by the 1976 Planning Board Resolution. On February 24, 1981, ARPE approved the plans for the first section ("the 1981 ARPE Resolution").

On February 22, 1982, PFZ timely submitted to ARPE construction drawings for site improvements for the subdivision works of block 2 of the first section ("the construction drawings"), as required by the 1976 Planning Board Resolution and the 1981 ARPE Resolution⁶. The construction drawings were accompanied by a letter from the firm of engineers, architects and planners engaged by PFZ to develop Vacía Talega. The letter informed ARPE that it was impossible for PFZ to present the final construction plans for the off-site

⁵The 1976 Planning Board Resolution approved the development project in two phases. The first section would create 2,000 hotel rooms and 2,000 residential units on 106 cuerdas. The second section would develop 6,600 hotel rooms and 6,135 residential units on 266.41 cuerdas.

The Puerto Rico Superior Court upheld the 1976 Planning Board Resolution against a petition filed by local residents requesting reconsideration of the 1976 Planning Board Resolution on the ground that the Planning Board did not adequately consider the development's impact on the environment and the residents living in the area. The Puerto Rico Supreme Court declined to exercise appellate jurisdiction over the resident's appeal on January 4, 1978.

⁶ARPE "shall issue the corresponding permit based on the compliance with the regulation provided in section 42a of this title and in the certificate submitted by said engineer or architect, and shall file a copy of said permit together with the plans and other documents, required in accordance with the regulation provided in sections 42a-42h of this title." 23 L.P.R.A. sec. 42c. It shall also have the powers "to investigate all matters relative to the transaction or granting of said permit...and may take such administrative or judicial action as may correspond." *Id.*

works because the endorsements of Aqueduct and Sewer Authority and the Electric Energy Authority were not received until November 3, 1981 and January 14, 1982, respectively.

In order to facilitate the processing of the project, PFZ also submitted the preliminary project plans for the structures to be constructed in block 2 of the first section ("the preliminary project plans") for ARPE's comments which were not required at that stage of the agency process. However, ARPE returned the preliminary project plans because they were premature and not in compliance with the 1981 ARPE Resolution, which established that the construction drawings for site improvements be processed first. ARPE also informed PFZ that it had sent the construction drawings to its Regional Office in Carolina, Puerto Rico.

On January 27, 1986, the PFZ engineers wrote to ARPE to inquire about the status of the construction drawings. On February 19, 1986 and September 9, 1986, ARPE held meetings to discuss the project with other Commonwealth agencies. PFZ and its engineers attended the September 9th meeting. At the meeting no one directly or indirectly questioned the validity and effectiveness of the 1976 Planning Board Resolution or the 1981 ARPE Resolution nor the timeliness of the filing of PFZ's construction drawings.

Sometime between the first and second ARPE meetings, two senators had proposed a bill to incorporate the Vacia Talega area as part of the Commonwealth forest system. The bill proposed to conserve for scientific, ecological and passive recreation purposes the Vacia Talega area, an area known for its mangrove-rich lands.

On February 26, 1987, the former administrator of ARPE, Lionel Matta-Garcia, wrote to PFZ's engineers informing them that because a considerable length of time had lapsed from the original approval of the project (October, 1970), it was necessary to receive updated comments from

the government agencies. The letter also stated that it considered the construction plans as preliminary because they lacked basic details about the urbanization works to serve the project. The letter granted PFZ a year from the date of the letter to submit final construction plans. Matta-Garcia warned PFZ that if this deadline was not complied with, then the project would be dismissed.

PFZ claims it never received this letter of February 26, 1987. PFZ points out that the letter was signed by Matta-Garcia two days before he retired and that his subordinate and incoming administrator, codefendant Rodriguez, did not forward the letter but had the letter filed in a secret file involving the Vacia Talega project.

On October 8, 1987, the PFZ engineers again wrote to ARPE requesting information regarding the processing of the project. ARPE never answered this letter.

In November and December of 1987, the local newspapers reported that sponsors of the bill to make Vacia Talega area a forest reserve, called on the Governor of Puerto Rico to freeze the PFZ project until the House could vote on the approved Senate bill. The newspapers also reported that the Governor was reevaluating public policy on the environmentally sensitive coastal area of Vacia Talega and that no permit decision would be made until a new public policy could be determined.

On November 27, 1987, PFZ's engineers resubmitted the returned preliminary project plans to ARPE. After a PFZ officer attended a December 9, 1987 meeting with the Special Advisor of the Governor to discuss the project, PFZ filed on December 28, 1987 this action.

On August 2, 1988, ARPE sent two letters to PFZ's engineers, one from the Assistant Administrator of ARPE's Area of Regional Operations and the other from Assistant Administrator in charge of ARPE's Program of Technical Revisions. In these two letters, PFZ was informed that the

1976 Planning Board Resolution and the 1981 ARPE Resolution were no longer in effect because the preliminary project plans were not considered advanced plans. ARPE returned the preliminary project plans but the construction drawings were neither returned nor referred to in the letter. On August 17, 1988, PFZ's engineers immediately wrote a letter to ARPE requesting reconsideration of the decision and unequivocally informing ARPE that it had reviewed the wrong drawings. Two sets of drawings were submitted by PFZ—the construction drawings and the preliminary project plans. The latter were sent to aid ARPE technicians in their review of the construction drawings. ARPE, nevertheless, denied PFZ's request for reconsideration.

PFZ then requested review of the agency's decision before the Puerto Rico Superior Court. The Superior Court affirmed the ARPE's decision and PFZ sought further review before the Puerto Rico Supreme Court. The Supreme Court denied review.

PFZ alleges that ARPE deliberately delayed processing of the construction drawings and illegally refused to process construction drawings pursuant to Puerto Rico law, ARPE's regulations and practices. PFZ claims that defendants' deliberate actions have deprived PFZ of its constitutional rights to procedural and substantive due process and equal protection. PFZ seeks damages and a permanent injunction prohibiting defendants from refusing to process the construction drawings and the preliminary project plans and ordering defendants that the construction drawings and the preliminary project plans be processed. Defendants move to dismiss on the ground that the complaint fails to state a claim under Section 1983. For the reasons below, we grant the motion to dismiss.

II. PROCEDURAL DUE PROCESS

To establish a claim for deprivation of procedural due process under Section 1983, PFZ must allege that 1) it has a

property interest and 2) defendants, acting under color of law, deprived plaintiff of that property interest without constitutionally adequate procedural process. *LOGAN v. ZIMMERMAN BRUSH CO.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265, 273 (1982). *See CLEVELAND Bd. of Education v. LOUDERMILL*, 470 U.S. 532, 541, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494, 503 (1985); *BOARD OF REGENTS v. ROTH*, 408 U.S. 564, 569-70, 92 S. Ct. 2701, 2705, 33 L.Ed.2d 548, 556-57 (1972).

Defendants argue that PFZ has failed to satisfy the first prong because PFZ cannot claim a property interest in a construction permit it has not yet received. Defendants contend that procedural due process is afforded only to persons who are enjoying a government benefit. Defendants contend that PFZ's application for a construction permit does not create a property interest in obtaining a construction permit and therefore they are not entitled to any type of process. PFZ claims, however, that it is reasonable to conclude that once it received the Planning Board's approval of its project in 1976 and ARPE's issuance of a formal resolution in 1981 that it had legitimate claim of entitlement to the government's approval of the construction drawings. Assuming that PFZ acquired a property interest in obtaining a construction permit for its project, PFZ does not show that it was deprived of adequate process.

The key issue in procedural due process was whether there was adequate process. Puerto Rico law afforded PFZ review of ARPE's denial to review PFZ's construction drawings. 23 L.P.R.A. sec. 72d⁷. The law provides for both agency and judicial review. PFZ had available the procedural remedy of requesting reconsideration of ARPE's denial to review PFZ's construction drawings. PFZ exercised that remedy in its letter of August 17, 1988. Although ARPE denied PFZ's

⁷ 23 L.P.R.A. sec. 72d provides that:

(footnote continues)

request for reconsideration, the mere denial does not mean that PFZ was not afforded a remedy. PFZ also appealed ARPE's denial to the Puerto Rico Superior Court and the Superior Court affirmed the agency's decision. PFZ sought further review before the Puerto Rico Supreme Court and the Supreme Court denied review. Because PFZ had available both administrative and judicial remedies, which PFZ exercised, we cannot conclude that PFZ was deprived of a meaningful opportunity to be heard in violation of due process. *See BELLO v. WALKER*, 840 F.2d 1124, 1128 (3rd Cir. 1988); *CREATIVE ENVIRONMENTS, INC. v. ESTABROOK*, 680 F.2d 822, 829-30 (1st Cir. 1982). *See also* *ROGERS v. OKIN*, 738 F.2d 1 (1st Cir. 1984); *ROY v. CITY OF AUGUSTA*, 712 F.2d 1517 (1st Cir. 1983).

PFZ claims that it was entitled to have ARPE review the construction drawings and make comments. PFZ argues that if the construction drawings did not comport with the regulations then according to ARPE'S custom and practice, ARPE

(footnote continued)

Any party aggrieved by the action, decision or resolution of the Regulations and Permits Administration on housing development cases, in regard to which a petition for reconsideration was instituted before the Administration within the first thirty (30) days from the mailing of the notice of said action or decision and was denied by the latter, may file a petition for review before the San Juan Part of the Superior Court of Puerto Rico or any Part whose jurisdiction comprises the place where the project is located, within the term of thirty (30) days reckoning from the mailing date of the notice of denial of the petition from reconsideration.

Once the petition for review is established, if the writ is issued, it shall be the duty of the Regulations and Permit Administration to remand to the court the record of the case within fifteen (15) calendar days following the issuance of the writ.

The review before the Superior Court shall be limited exclusively to issues of law.

had to inform proponent of the project and give the proponent an opportunity to make changes. Although ARPE may not have afforded PFZ with the opportunity to make changes before the construction drawings were rejected pursuant to ARPE's custom and practice, the mere refusal to follow state law or agency custom does not give rise to a federal violation. In *ROY*, the court emphasized that where state courts are available to correct errors, "the mere fact the individual defendants may have refused to renew (plaintiff's) permit for reasons untenable under Maine law gives rise to no federal right". 712 F.2d at 1523. *See also* *CHILPIN ENTERPRISES, INC. v. CITY OF LEBANON*, 712 F.2d 1524, 1526 (1st Cir. 1983) (a mere bad faith refusal does not constitute a due process violation where judicial review is available to correct the error). Like the plaintiff in *ROY*, PFZ received minimal due process in the form of reconsideration before the agency and appeal before the local courts. *Id.*

III. SUBSTANTIVE DUE PROCESS

The First Circuit has repeatedly found that controversies surrounding rejections of proposed land development projects and denials of permits does not amount to a federal constitutional violation. *See* *CHILPIN ENTERPRISES, INC. v. CITY OF LEBANON*, 712 F.2d 1524 (1st Cir. 1983); *ROY v. CITY OF AUGUSTA*, 712 F.2d 1517 (1st Cir. 1983); *CREATIVE ENVIRONMENTS, INC. v. ESTABROOK*, 680 F.2d 822 (1st Cir. 1982). The Court has also held that even where state officials have clearly violated state law in the area of land planning or zoning, this action does not rise to the level of a constitutional deprivation. In order to establish a substantive due process claim involving a dispute between a developer and a state agency, the developer must show that there was racial animus, political discrimination, or fundamental procedural irregularity in the processing of the projects. *CHILPIN ENTERPRISES*, 712 F.2d at 1528; *ROY*, 712 F.2d at 1523; *CREATIVE ENVIRONMENTS*, 680 F.2d at 833. *See* *RASKIEWICZ v. TOWN OF NEW BOSTON*,

754 F.2d 38, 44 (1st Cir. 1985) ("federal courts do not sit as a super zoning board or a zoning board of appeals"); *STEEL HILL DEVELOPMENT v. TOWN OF SANBORNTON*, 469 F.2d 956, 960 (1st Cir. 1972) ("a court does not sit as a super zoning board with power to act *de novo*, but rather has, in the absence of alleged racial or economic discrimination..., a limited role of review").

PFZ alleges that ARPE violated its rights under substantive due process when ARPE arbitrarily, capriciously or illegally delayed and denied review of the construction drawings. PFZ further alleges that the handling of its project was tainted with fundamental procedural irregularities. PFZ specifically claims that defendants disregarded and concealed from PFZ the ARPE letter of February 1987. This letter was written by Matta-Garcia, the former administrator of ARPE, informing that its construction plans were considered preliminary and granting PFZ one year from the date of the letter to submit the final construction plans for the urbanization works. PFZ also claims that defendants conducted a sham review of the construction drawings.

PFZ's claim is more similar to the claim rejected in *CREATIVE ENVIRONMENTS, INC. v. ESTABROOK*, 680 F.2d 822 (1st Cir. 1981), *cert. denied*, 459 U.S. 989, 103 S.Ct. 345, 74 L.Ed.2d 385 (3rd Cir. 1982). In *CREATIVE ENVIRONMENTS, INC.*, a real estate developer claimed that its residential housing development project was improperly rejected by the local planning board. The planning board rejected the project because it feared the social effects the development may have on the community and the voter influence the incoming homeowners' association may pose. The developer argued that the planning board engaged in misapplication of state law. The first Circuit stated that "property is not denied without due process simply because a local planning board rejects a proposed development for erroneous

reasons or makes demands which arguably exceed its authority under the relevant state statutes." *Id.* at 832n.9. The Court also stated that:

(e)very appeal by a disappointed developer from an adverse ruling by a local...planning board necessarily involves some claim that the board exceeded, abused or "distorted" its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough simply to give these state law claims constitutional labels such as "due process" or "equal protection" in order to raise a substantial federal question under section 1983. As has been often stated, 'the violation of a state statute does automatically give rise to a violation of rights secured by the Constitution.' (citation omitted).

Id. at 833

The First Circuit reemphasized these principles in *CHILPIN ENTERPRISES, INC. v. CITY OF LEBANON*, 712 F.2d 1524 (1st Cir. 1983) and in *ROY v. CITY OF AUGUSTA*, 712 F.2d 1517 (1st Cir. 1983). In *CHILPIN ENTERPRISES*, the planning board had granted preliminary approval of a project but later denied a building permit for the project. The developer filed suit in state court and successfully obtained a permit on the ground that the planning board had no authority to review site plans for "multi-family dwelling units." The developer then filed a Section 1983 action alleging damages for the five-year delay in obtaining the permit. The First Circuit found that "(a) mere bad faith refusal to follow state law in such local administrative matters simply does not amount to a deprivation of due process where the state courts are available to correct error." *Id.* R 1528

In ROY, the court held that plaintiff has stated a constitutional claim when he had been denied a renewal of his pool hall license because defendants had allegedly disregarded a state court order requiring the issuance of the license. The Court stated that if the case had involved a denial of a license based on improper reasons, such a claim would not have constituted a constitutional violation. 712 F.2d at 1523.

Based on First Circuit precedent, PFZ's allegations that ARPE officials have deliberately failed to comply with its own agency regulations or practices in the review of PFZ's construction drawings are not enough to state substantive due process claim because claims of outright violations of state law or regulations in the area of land planning or zoning are not considered constitutional violations. Similar to this case, in CLOUTIER v. TOWN OF EPPING, 714 F.2d 1184 (1st Cir. 1983), the plaintiff alleged various unlawful action such "abuse of process, perjury, failing to come forward with material evidence, and giving false information to a state agency about the plaintiffs". *Id.* at 1189. Nevertheless, said action was not considered egregious behavior to amount to a constitutional violation under due process.

PFZ also alleges that the review of the project has been tainted with fundamental procedural irregularities. PFZ claims that once ARPE issued the 1976 Resolution, approving PFZ's preliminary development plans for the first section, ARPE had neither the authority nor the discretion to refuse to review PFZ's construction drawings, but rather ARPE was only required to make a technical review of the construction drawings. If the construction drawings did not meet the technical requirements, ARPE would inform the developer so that the developer could make the necessary revisions. After this "back and forth" process is completed and the construction drawings are in compliance with ARPE's resolution and regulations, ARPE must issue a construction permit.

We recognize that ARPE may have engaged in delaying tactics and may have intentionally denied the Vacia Talega

project. However, it is not our place to adjudicate these claims. Federal courts cannot review disagreements a developer has with the handling of its project by an agency even though agency has engaged in delays and intentional violations. *CHILPIN ENTERPRISES*, 712 F.2d at 1528; *ROY*, 712 F.2d at 1523; *CREATIVE ENVIRONMENTS*, 680 F.2d at 833. However, developers are not left without a remedy because state courts are available to redress any wrongs committed by state planning agencies. It must be emphasized that this is a type of dispute which concerns local interest (i.e. environment and development of the island). PFZ may have a claim under local law which it can pursue in that forum. *See CREATIVE ENVIRONMENTS*, 680 F.2d at 833; *ROY*, 712 F.2d at 1523.

IV. EQUAL PROTECTION

Many of the arguments made by PFZ under substantive due process are the same for its equal protection claim. PFZ's principle argument is that ARPE engaged in "illegal political considerations." In support of this contention, PFZ relies on the First Circuit case of *CORDECO DEVELOPMENT CORP. v. SANTIAGO VAZQUEZ*, 539 F.2d 256 (1st Cir. 1976), *cert. denied*, 429 U.S. 978, 97 S.Ct 488, 50 L.Ed.2d 586 (1976). However, we find that this is case inapposite. *CORDECO* involved a litigant who alleged that government officials acted maliciously and with illegitimate "political" or personal motives in delaying and denying a permit to extract sand. The circuit court affirmed the trial court's ruling that defendants denied the permit in order to favor plaintiff's competitor who was a family with close political ties to the incumbent administration. In that case, there was a constitutional violation because officials had adversely treated a particular permit applicant due to partisan political considerations, even though the purposeful discrimination was not based on invidious classification.

On the contrary, PFZ has not alleged facts that defendants have succumbed to political pressure from a rival developer. Nor does PFZ allege that the reason for the defendants' action was a result of partisan politics.⁸ This case also does not involve discrimination based on invidious classification (i.e. race or religion); this is not a case where PFZ was singled out for disparate treatment anent other similarly situated developers. *See* LECLAIR v. SAUNDERS, 627 F.2d 606 (2d. Cir. 1980). The Governor's remarks in the press that his views on the development of Vacia Talega had changed and that he now plans to preserve the area in its natural state, cannot be characterized as impermissible, even if made with a view to appease voters, rather than for truly environmental reasons. We note that under Puerto Rico law, the Governor of Puerto Rico has the authority to revoke development policies created by the Planning Board. 23 L.P.R.A. sec. 62j(6). Consequently, PFZ has failed to state a cause of action for violation of equal protection of the laws.

WHEREFORE, for the foregoing reasons, defendants' motion to dismiss is hereby **GRANTED**.

IT IS SO ORDERED.

San Juan, Puerto Rico, March 9, 1990.

HECTOR M. LAFFITTE
U.S. District Judge.

⁸ PFZ's Counsel was asked, at the Pretrial Conference, whether it was claiming that denial of permit was because it supported a rival political party. PFZ's counsel responded that was not the case. *See* Transcript of Pretrial and Settlement Conference of December 8, 1989.

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.,
Plaintiff,
v.
RENE A. RODRIGUEZ,
et al.,
Defendants.

CIVIL NO. 87-1915 HL

JUDGEMENT

The Court having entered an Opinion and Order granting defendants' Motion to Dismiss on this same date, it is hereby **ORDERED AND ADJUDGED** that this case be **dismissed**.

San Juan, Puerto Rico, March 9, 1990.

HECTOR M. LAFFITTE
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.	}	CIVIL NO. 87-1915 (HL)
Plaintiff		
vs.		
ARPE and RENE RODRIGUEZ		
Defendants		

SWORN STATEMENT

The undersigned, ADALBERTO COLON LEBRON, under the most solemn oath and in support of a "Motion for Reconsideration or, in the Alternative, for the stay of Judgment" filed by Plaintiff PFZ in the above captioned case hereby deposes and says:

1. That my name is as stated above; that I am of legal age, married and a resident of Fajardo, Puerto Rico.

2. That I am a civil engineer with license number 3240 issued by the Board of Examiners of Architects, Engineers and Surveyors of the Commonwealth of Puerto Rico, which license was issued to me in 1957.

3. That from 1957 to 1986 I have practiced my profession on the public sector as an employee of, first, the Department of Public Works and CRUV for two years and, thereafter, as an employee and officer of the Planning Board of the Commonwealth of Puerto Rico, until 1985 when I was appointed Associated Member of the Board.

[2]

4. That from 1959 up to the date of my retirement 1986, I worked at the Planning Board of the Commonwealth of Puerto Rico in different capacities.

5. That after my retirement from public service in 1986 I have practiced my profession as a consultant for the private sector.

6. That from 1958 to 1959 I worked as an engineer in charge of designing urbanization and residential public projects for the Puerto Rico Urban Renewal & Housing Corporation.

7. That from 1959 to 1963 I worked for the Planning Board of the Commonwealth of Puerto Rico in the Division of Private Projects as engineer in charge of reviewing drawings for urbanization construction works and in the inspection of urbanization construction works.

8. That from 1963 to 1966 I continued working for the Planning Board as Director of the Division of Private Projects, and, as Director, I was in charge of supervising the work of the engineers in charge of reviewing drawings for urbanization construction works and inspecting the construction of urbanization works.

9. That from 1966 to 1968 I continued working for the Planning Board as Assistant to the Director of the Area of Operations. In said position I advised the Director of Area Operations on matters pertaining to land developments, including aspects such as earth movements, storm sewage, flood

[3]

control works, urbanization works and other similar related matters.

10. That from 1968 to 1970 I continued working for the Planning Board as Director of the Bureau of Land Development and Use and the Bureau of Projects Revision. As Director I was in charge of supervising and directing the activities related to land development for urbanization projects including the processing before the Planning Board of all stages of the projects.

11. That from 1971 to 1973 I continued employed by the Planning Board as Director of the Office of Supervision and Orientation of the several Regional Offices. In said position I supervised, coordinated and directed the works of the Regional Offices concerning matters such as urbanization construction works, construction permits, and use permits, among others.

12. That from 1974 to 1978 I continued employed by the Planning Board, as Director of the Bureau of Land Subdivisions and the Bureau of "Consultas sobre uso de terreno".

13. That from 1978 to 1982 I continued working for Planning Board as Director of the Bureau of Land Use Plans.

14. That from 1982 to 1984 I continued working for the Planning Board as Assistant Executive Director and in 1985 I was appointed as Associated Member of the Planning Board, which position I held until my retirement in 1986.

[4]

15. That during the course of my employment with Planning Board I became familiar and dealt constantly with Planning Board Resolutions JP 139, JP 213 and the manual for reviewing construction drawings adopted by said Resolution JP 213. These documents govern the procedures established by Planning Board and ARPE for the processing, examination and evaluation of construction drawings submitted to the consideration of Planning Board and ARPE prior to the adoption of the Certification Law and the Certification Regulations which, as to drawings for the construction of urbanization works, became effective in 1984.

16. That through the examination of documents pertaining to the above captioned case, such as Resolutions issued by Planning Board and ARPE, official communications from ARPE to Plaintiff and from Plaintiff to ARPE I have become familiar with the fact surrounding the instant litigation in the particular area of the processing of the drawings

for the construction of urbanization works submitted by Plaintiff to ARPE on February 1982.

17. That according to the procedures established by ARPE and Planning Board and, in particular, the manual for the reviewing of construction drawings adopted by Resolution JP 213, copy of which manual is annexed as part of the memorandum of plaintiff PFZ, the only six dispositions that ARPE may make are as follows:

a. approve the construction; or

[5]

b. conditionally approve the construction; or

c. set forth the requirements necessary to bring the drawings into compliance with existing law; or

d. deny the construction with an explanation of the conditions under which the construction will be approved; or

e. dismiss the case only if the proponent abandons the project or the effective date of the preliminary development expires; or

f. ask for additional information.

18. That in connection with the drawings for the construction of urbanization works submitted by PFZ to ARPE on February 1982, ARPE failed to dispose of them in a manner contemplated by any of the six possible dispositions established by the manual.

19. That through all of my years of experience I am not aware of any case, other than the instant case, in which construction drawings were disposed of in a manner not contemplated by any of the aforementioned six possible dispositions.

20. That based upon my experience I am not aware of any case, other than the instant case, in which construction

drawings have been rejected without the rejection be accompanied by statement of the conditions under which the drawings would be approved and a time limitation to the proponent of the drawings within which to comply with the conditions.

[6]

21. That I am not aware of any case other than the instant case in which ARPE unconditionally rejected construction drawings and through such rejections cancelled the effectiveness of prior Planning Board and ARPE approval.

22. During the course of my experience as a professional engineer in all cases of which I am aware involving deficiencies of constructions drawings, the proponents of the drawings presented to ARPE or Planing Board for review has always be given the opportunity to make, within a reasonable time established by the agency, the necessary revisions or corrections to the drawings.

23. Proponents must always be given the opportunity to make necessary revisions if they wish to do so, and I am aware of no case, except the instant case, in which this opportunity was not provided.

24. I am not aware of any case, except those cases in which the proponent abandoned the project, in which construction drawings for a project were submitted to ARPE (or before the existence of ARPE, to the Planning Board), and ARPE (or the Planning Board) denied the project without providing the proponent with the opportunity to correct any deficiencies.

25. I am not aware of any circumstances under which the Governor of the Commonwealth of Puerto Rico should be involved in ARPE's review of construction drawings.

[7]

26. That I have read the above Sworn Statement; that same was prepared by the attorney for the Plaintiff, Mr. José

Luis Novas Dueño, in my presence and under my directions; and that everything that is herein stated is true according to the best of my own professional knowledge and information.

IN WITNESS WHEREOF, I executed this Sworn Statement, in San Juan, Puerto Rico, this 23 day of March, 1990.

ADALBERTO COLON LEBRON

AFFIDAVIT NO. 10,083

Sworn and subscribed to before me by Adalberto Colón Lebrón, of the personal circumstances above mentioned, to me personally known at San Juan, Puerto Rico, this 23 day of March, 1990.

Notary Public

SIGNATURES OMITTED IN PRINTING

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

PFZ PROPERTIES, INC.	}	
Plaintiff,		
v.		
RENE ALBERTO RODRIGUEZ,	}	CIVIL NO. 87-1915 HL
<i>et al.</i> ,		
Defendants.		

ORDER

Plaintiff moves the Court to reconsider its March 9, 1990 opinion and order granting defendants' motion to dismiss and dismissing plaintiff's complaint. Defendants have not opposed this motion. Because plaintiff's motion for reconsideration is basically a rehash of the arguments raised in its lengthy oppositions to defendants' motion to dismiss and motion for summary judgment, the Court addresses only plaintiff's first and last grounds for reconsideration.

As to plaintiff's first point for reconsideration, plaintiff contends that this Court erred in concluding that plaintiff was not deprived of a meaningful opportunity to be heard in violation of a due process because plaintiff had available both administrative and judicial remedies. Plaintiff asserts that the availability of state administrative and court remedies does not bar due process claims under 42 U.S.C. section 1983. Plaintiff refers to *MILLER v. TOWN OF HULL*, 878 F.2d 523,529 (1st Cir. 1989) to support this argument. The Court was fully aware of the *MILLER* case when defendants' dispositive motions were under advisement but nevertheless concluded then that the *MILLER* opinion had no bearing on this case. In *MILLER*, the First Circuit rejected the argument that exhaustion of state remedies is required in order to state a Section 1983 claim. Our opinion and order did not state or

infer that plaintiff had to exhaust their local remedies as a prerequisite in alleging a Section 1983 cause of action. Plaintiff's due process was dismissed on the merits because Puerto Rico law provided adequate process by affording plaintiff various reviews of defendants' administrative decisions. As such, the *MILLER* case does not alter our position on plaintiff's due process claim.

Plaintiff's last point for reconsideration is that the Court should have allowed it to take the depositions of two Governor's aides before rendering a decision on the merits of its case. We disagree. We do not think that the despositions of these aides would have impacted on the results of this case. Moreover, in deciding the motion to dismiss, plaintiff's allegations in the complaint were accepted as true and every inference was read in the light most favorable to plaintiff. See Opinion and Order of March 9, 1990 at 2.

WHEREFORE, plaintiff's motion for reconsideration or in the alternative for stay of judgment is hereby **DENIED**.

IT IS SO ORDERED.

San Juan, Puerto Rico, June 15, 1990

HECTOR M. LAFFITTE
U.S. District Judge.

United States Court of Appeals
For the First Circuit

No. 90-1723

PFZ PROPERTIES, INC.,
Plaintiff, Appellant,

v.

RENE ALBERTO RODRIGUEZ, ETC., ET AL.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
[Hon. Hector M. Laffitte, U.S. DISTRICT JUDGE]

Before
Campbell and Cyr, Circuit Judges,
and Fuste,* District Judge.

Thomas Richichi with whom Kathryn E. Szmuszkovicz,
Deborah K. Gunn, Beveridge & Diamond, P.C. and Jose Luis
Novas-Dueno were on brief for appellant.

Vannessa Ramirez, Assistant Solicitor General, Depart-
ment of Justice, with whom Jorge E. Perez Diaz, Solicitor
General, was on brief for appellees.

March 18, 1991

*Of the District of Puerto Rico, sitting by designation.

CAMPBELL, *Circuit Judge*. This case arose out of a dispute over the development of a residential and tourist project in an area known as Vacia Talega in Loiza, Puerto Rico. Plaintiff-appellant PFZ Properties ("PFZ") filed a complaint under 42 U.S.C. § 1983, alleging that defendants Rene Alberto Rodriguez, Salvador Arana, and the Regulations and Permits Authority of the Commonwealth of Puerto Rico ("ARPE") had violated its constitutional rights to procedural and substantive due process and equal protection guaranteed by the Fourteenth Amendment to the United States Constitution. The district court dismissed the complaint pursuant to Fed. R.Civ.P. 12(b)(6) for failure to state a claim. PFZ filed a timely appeal. Because we agree with the district court that PFZ's complaint does not state a valid claim under § 1983, we affirm the dismissal.

I.

As this appeal follows the dismissal of the complaint under Rule 12(b)(6), we accept the factual averments of the complaint as true, and construe these facts in the light most favorable to the plaintiff's case.¹ *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

PFZ owns 1,358.65 cuerdas of land in Loiza, Puerto Rico in an area known as Vacia Talega and Pinones. In May, 1976, the Planning Board of Puerto Rico adopted a resolution approving a Preliminary Development Plan submitted by PFZ for portions of this parcel. According to the approved Plan, development was to proceed in two phases, the first

¹ Plaintiff-appellant complains that, although purporting to evaluate the adequacy of the complaint under Fed.R.Civ.P.12(b)(6), the district court did not limit its consideration to allegations contained in the pleadings. We need not address this contention, as we limit our own analysis to the allegations in the Amended Complaint. We conclude, wholly apart from factual allegations contained elsewhere in the briefs and in the record, that the plaintiff has failed to state a claim upon which relief can be granted.

section to include constructing 2,000 hotel rooms and 2,000 residential units on 106 cuerdas, the second to include 6,600 hotel rooms and 6,135 residential units on 266.41 cuerdas. From the beginning, matters did not go smoothly for PFZ. On June 14, 1976, the residents of Barrio Torrecilla Baja, Loiza, Puerto Rico, filed a petition in the Superior Court of Puerto Rico requesting reconsideration of the Planning Board's resolution approving the Preliminary Development Plan and alleging that the Board had failed to consider adequately the development's impact on the environment and the residents of the area.

The Superior Court affirmed the Board's resolution in September, 1977, and the Supreme Court of Puerto Rico denied review in January, 1978.

On August 19, 1977, the Planning Board extended the time during which PFZ was required to submit preliminary plans to ARPE for the development of Block 1 of the first section until one year after the Superior Court's decision became final, assuming that decision were in PFZ's favor. On August 24, 1978, PFZ submitted preliminary plans for the development of the entire first section to ARPE. In February, 1981, nearly three years later, the plans were approved by ARPE. By this time, the project had been scaled down somewhat — the first section was to include approximately 500 hotel rooms, 1,952 residential apartment units, and 1,104 condo-hotel apartment units on 79.93 cuerdas.

On February 22, 1982, PFZ submitted construction drawings for site improvements for the subdivision works of Block 1 of the first section and preliminary project plans for the structures to be constructed on Block 2 of the first section. On March 24, ARPE returned the preliminary project plans to PFZ, stating that submission of the plans was premature and that, according to the 1981 ARPE Resolution, construction drawings for site improvements must be processed first. ARPE also explained that it had sent the site improvement drawings for Block 1 to its regional office in Carolina, Puerto

Rico. There was apparently no communication between PFZ and ARPE for four years. PFZ inquired by letter about the status of the plans in January, 1986; however, ARPE did not answer the letter.

ARPE invited PFZ to attend a meeting in September, 1986 to give a presentation on the project to various agencies of the Commonwealth. During that meeting, the project was discussed, but neither the validity of the 1976 and 1981 Resolutions nor the sufficiency or timeliness of the filings was questioned.

In November, 1987, the PFZ engineers resubmitted the preliminary project plans to ARPE. The next month, Jack Katz, a PFZ officer, attended a meeting with Mr. Amadeo Francis, Special Advisor to the Governor, to discuss the project. On December 28, 1987, PFZ filed its original complaint in the United States District Court for the District of Puerto Rico, alleging that ARPE's continued refusal to process the drawings and issue the permits constituted a violation of PFZ's right to due process and amounted to a taking without just compensation under the United States Constitution.² Defendants filed an answer to the complaint and a motion to dismiss.

On August 2, 1988, ARPE informed PFZ by letter that the 1976 Planning Board Resolution and the 1981 ARPE Resolution were no longer in effect. PFZ requested reconsideration of the decision. ARPE denied the request. PFZ also petitioned for review of ARPE's decision in Superior Court. This petition, along with its petition for certiorari to the Supreme Court of Puerto Rico, were denied. PFZ filed its Amended Complaint in federal district court on October 11, 1988, alleging that ARPE's failure and continued refusal to process the construction drawings have deprived PFZ of its rights to procedural and substantive due process under the

² The takings claim was not pursued in PFZ's Amended Complaint, *infra*.

Fourteenth Amendment to the United States Constitution. PFZ also alleged that the treatment afforded its project differed substantially from the treatment of others similarly situated, thereby violating PFZ's right to equal protection under the Fourteenth Amendment.

The district court held that the post-deprivation process afforded to PFZ under Puerto Rico law was constitutionally adequate. It also held that, given the absence of any allegations of racial animus, political discrimination, or fundamental procedural irregularity, PFZ had failed to state a claim for violation of its rights to due process or equal protection under the Fourteenth Amendment. The district court therefore dismissed the complaint.

II.

A. Procedural Due Process

In order to establish a procedural due process claim under § 1983, PFZ must allege first that it has a property interest as defined by state law and, second, that the defendants, acting under color of state law, deprived it of that property interest without constitutionally adequate process. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). With respect to the first requirement, PFZ argues that, once the Planning Board gave its approval of PFZ's project in 1976 and once ARPE adopted a resolution approving the project in February, 1981, PFZ had acquired a legitimate claim of entitlement to approval of the construction drawings and to issuance of a building permit. Although we think it far from clear that PFZ's expectation of receiving a construction permit from ARPE constituted a property interest under Puerto Rico law, we may assume, *arguendo*, that the facts alleged in the complaint are sufficient to establish such an interest.

Assuming that PFZ had a property interest in obtaining the construction permit, it was deprived of that interest when ARPE refused to process the construction drawings. This deprivation was "under color of state law" for the purposes of

§ 1983. We turn, therefore, to the adequacy of the process afforded PFZ. Under Puerto Rico law, PFZ was entitled to request reconsideration of the decision by ARPE and, if reconsideration was denied, to file a petition for review of ARPE's action in the Superior Court of Puerto Rico.³ PFZ now argues that this post-deprivation remedy was inadequate — that PFZ was entitled to an administrative hearing before the denial by ARPE. We disagree.

PFZ does not contend that the project approval procedures established by Puerto Rico law and by ARPE's custom and practice violate the Due Process Clause of the federal Constitution. Rather, it alleges that ARPE illegally departed from Puerto Rico's prescribed procedures by failing to process the construction drawings. When a deprivation of property results from conduct of state officials violative of state law, the Supreme Court has held that failure to provide predeprivation process does not violate the Due Process Clause. See *Parratt v. Taylor*, 451 U.S. 527, 543 (1980). Indeed, it makes little sense to argue that ARPE had to afford the plaintiff a hearing before it illegally departed from its own procedures by refusing to process the construction drawings. The state is not required to anticipate such violations of its own constitutionally adequate procedures. To hold otherwise would convert every departure from established administrative procedures into a violation of the Fourteenth Amendment, cognizable under § 1983. See *Creative Environments v. Estabrook*, 680 F.2d 822, 832 n.9 (stating that "where a state has provided reasonable remedies to rectify a legal error by a

³ 23 L.P.R.A. § 72 provides as follows:

Any party aggrieved by the action, decision or resolution of the Regulations and Permits Administration on housing development cases, in regard to which a petition for reconsideration was instituted before the Administration within the first thirty (30) days from the mailing of the notice of said action or decision and was denied by the latter, may file a petition for review before the . . . Superior Court of Puerto Rico.

local administrative body . . . due process has been provided"), *cert. denied*, 459 U.S. 989 (1982).

As, therefore, a pre-deprivation hearing was not required to meet the demands of the Due Process Clause, the only question is whether the post-deprivation process available to PFZ was adequate. We hold that the combination of administrative and judicial remedies provided by Puerto Rico law is sufficient to meet the requirements of due process. Under Puerto Rico law, PFZ had the right to petition for reconsideration by ARPE and for review in the Superior Court. Although ARPE declined the request for reconsideration and the Superior Court denied the petition for review, PFZ had the opportunity to present its allegations of administrative error and misconduct before the relevant administrative and judicial bodies of the Commonwealth of Puerto Rico. That relief from the agency decision was denied does not affect the adequacy of the process provided. *See id.*

B. Substantive Due Process

In addition to its procedural due process claim, PFZ alleges that ARPE violated its rights to substantive due process when ARPE arbitrarily or capriciously refused to process its approved construction drawings. This Court has repeatedly held, however, that rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process. *See, e.g., Chongris v. Board of Appeals of Town of Andover*, 811 F.2d 36, 42-43 (1st Cir.), *cert. denied*, 483 U.S. 1021 (1987); *Chiplin Enterprises v. City of Lebanon*, 712 F.2d 1524, 1528 (1st Cir. 1983); *Creative Environments*, 680 F.2d at 829-30. Even where state officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation. *See Chiplin Enterprises*, 712 F.2d at 1528. The doctrine of substantive due process "does not protect individuals from all [governmental] actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents 'governmental power from

being used for purposes of oppression,' or 'abuse of government power that shocks the conscience,' or 'action that is legally irrational in that it is not sufficiently keyed to any legitimate state interest' "*Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 943 (D.C. Cir. 1988) (citations omitted). *See Pittsley v. Werish*, No. 90-1372 (1st Cir. February 27, 1991); *see also Hoffman v. City of Warwick*, 909 F.2d 608, 618 (1st Cir. 1990) (applying a "rational basis" test to governmental action challenged under a substantive due process theory). PFZ's allegations concerning ARPE's treatment of its proposal simply do not make out a substantive due process violation under this standard.

PFZ's substantive due process claim is similar to a developer's claim rejected by this Court in *Chiplin Enterprises*. There the planning board, after granting preliminary approval to a development project, denied a building permit for the project. The developer filed suit in state court and successfully challenged the authority of the planning board to review the site plans. After obtaining the permit, the developer brought a § 1983 action in federal court alleging a violation of his substantive due process rights. This court rejected the claim, stating that "[a] mere bad faith refusal to follow state law in such local administrative matters simply does not amount to a deprivation of due process where the state courts are available to correct error." 712 F.2d at 1528.

We rejected another such claim in *Creative Environments v. Estabrook*. (T)here the planning board had refused to approve a developer's project based on its fear of the social and political effects the development might have on the community. Rejecting the developer's due process claim, the court explained that "property is not denied without due process simply because a local planning board rejects a proposed development for erroneous reasons or makes demands which arguably exceed its authority under the relevant state statutes." 680 F.2d at 832 n.9.

Consistent with the above, we hold that PFZ's allegations that ARPE officials failed to comply with agency regulations or practices in the review and approval process for the construction drawings are not sufficient to support a substantive due process claim under the Fourteenth Amendment to the United States Constitution. See *Amsden v. Moran*, 904 F.2d 748, 757 (1st Cir. 1990) (noting that "even bad faith violations of state law are not necessarily tantamount to unconstitutional deprivations of the due process"), *cert. denied*,

U.S. ___, 111 S. Ct. 713 (1991). Even assuming that ARPE engaged in delaying tactics and refused to issue permits for the Vacía Telega project based on considerations outside the scope of its jurisdiction under Puerto Rico law, such practices, without more, do not rise to the level of violations of the federal constitution under a substantive due process label.

C. Equal Protection

PFZ's equal protection claim represents, in effect, recharacterization of its substantive due process claim. PFZ argues that ARPE's refusal to process the construction drawings "differ[ed] invidiously from the process and treatment accorded to drawings and plans of others similarly situated." In *Creative Environments*, we suggested in a footnote that an equal protection claim "may be presented in situations involving gross abuse of power, invidious discrimination or fundamentally unfair procedures." 680 F.2d at 832 n.9. PFZ, however, alleges no facts that would suggest discrimination based on an invidious classification such as race or sex, nor does it allege the type of egregious procedural irregularities or abuse of power mentioned by *Creative Environments* as conceivably rising to the level of a federal equal protection violation. Alleging only that ARPE treated its project differently from others under consideration, PFZ's equal protection claim represents nothing more than a claim that ARPE departed from its own procedures or those provided by Puerto Rico Law.

Again, we emphasize that, whether under a due process or equal protection theory, departures from administrative procedures established under state law or the denial of a permit based on reasons illegitimate under state law, do not normally amount to a violation of the developer's federal constitutional rights. As we stated in *Creative Environments*,

[e]very appeal by a disappointed developer from an adverse ruling by a local . . . planning board necessarily involves some claim that the board exceeded, abused or "distorted" its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough simply to give these state law claims constitutional labels such as "due process" or "equal protection" in order to raise a substantial federal question under section 1983.

680 F.2d at 833. Absent allegations reflective of more fundamental discrimination, we agree with the district court that PFZ did not state a claim under the Equal Protection Clause of the Fourteenth Amendment.

III.

Accepting the factual allegations of the complaint as true and construing them in the light most favorable to plaintiff, we hold that the plaintiff did not state a federal claim.

Affirmed. Costs to appellees.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1723

PFZ PROPERTIES, INC.
Plaintiff, Appellant,
v.
RENE ALBERTO RODRIGUEZ, ETC., ET AL.,
Defendants, Appellees

JUDGEMENT

Entered: March 18, 1991

This cause came on to be heard on appeal from the United States District Court for the of Puerto Rico, and was argued by counsel.

Upon consideration wherof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

FRANCIS P. SCIGILIANO

Clerk.

[cc: Mr. Richichi and Ms. Ramirez]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1723

PFZ PROPERTIES, INC.,
Plaintiff, Appellant,
v.
RENE ALBERTO RODRIGUEZ, ETC., AL.,
Defendants, Appellees.

BEFORE

Campbell and Cyr, Circuit Judges,
and Fuste,*District Judge.

ORDER OF COURT

Entered: April 23, 1991

In its Petition for Rehearing, appellant PFZ Properties, Inc. argues that rehearing is warranted because the panel limited its consideration to the allegations contained in the amended complaint and did not take into account the additional factual allegations contained in the pretrial order. We note, however, that PFZ did not raise any such argument in its brief. Indeed, it argued that the district court *erred* in taking into consideration facts outside the pleadings (but contained in the pretrial order) in applying a motion to dismiss standard. Having failed to raise it in its brief, PFZ may not rely upon the argument in support of its petition for rehearing. *See e.g., United States v. Ferryman*, 897 F.2d 591 (1st Cir. 1990) (issue raised for the first time in petition for rehearing dismissed as not properly before the court); *Arajuo v. Woods Hole*, 693 F.2d 1, 4 (1st Cir. 1982) (refusing to consider theory raised for the first time in petition for rehearing).

We note also that, in our review under 12(b)(6), we indulged all inferences in favor of PFZ, the nonmovant. For example, we assumed that ARPE had violated its own rules,

that its procedures were irregular, and even that it had singled out PFZ for differential treatment. None of the additional factual allegations in the pretrial statement add significantly to the facts taken as true in our opinion. thus, even if PFZ had raised the argument in a timely manner, the outcome of the case would not have been different.

The petition for rehearing is denied.

By the Court:

.....
FRANCIS P. SCIGILIANO

Clerk.

*Of the District of Puerto Rico, sitting by designation.

DEC 27 1991

OFFICE OF THE CLERK

No. 91-122

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

PFZ PROPERTIES, INC.,

vs.

Petitioner,

RENE ALBERTO RODRIGUEZ, et al.,

Respondents.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT**

BRIEF OF PETITIONER

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PETITION FOR CERTIORARI FILED JULY 22, 1991
CERTIORARI GRANTED NOVEMBER 12, 1991

QUESTION PRESENTED

Whether an arbitrary, capricious or illegal denial of a construction permit to a developer by officials acting under color of state law can state a substantive due process claim under 42 U.S.C. § 1983.

LIST OF PARTIES AND RULE 29 LIST

The appellant in the case below is the petitioner herein, PFZ Properties, Inc. ("PFZ"). PFZ was the plaintiff in the District Court action from which the appeal was taken.

The appellees in the case below are the respondents herein and include:

- (1) René A. Rodriguez, in his individual capacity;
- (2) Salvador Arana, in his capacity as Administrator of the Regulations and Permits Authority of the Commonwealth of Puerto Rico; and
- (3) the Regulations and Permits Authority of the Commonwealth of Puerto Rico.

Petitioner PFZ Properties, Inc. is a privately held corporation and has no publicly owned parent, subsidiary or affiliate.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
LIST OF PARTIES AND RULE 29 LIST	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
I. STATEMENT OF THE CASE	3
A. Procedural History	3
B. Facts Material to the Question Presented ..	4
II. SUMMARY OF THE ARGUMENT	9
III. ARGUMENT	10
A. The Due Process Clause	10
1. The Basis for Substantive Due Process ..	10
2. Fundamental Rights	13
3. Other Protected Rights — The Right to Devote Private Property to a Legitimate Use	14
4. The Limited Impact on the Courts of Constitutional Protection of Land Use Rights	21
B. The Decision Below	23
1. PFZ Stated a Substantive Due Process Claim in a Protected Right	23
2. The First Circuit Committed Reversible Error by Not Recognizing PFZ's Protected Constitutional Right	24
IV. CONCLUSION	30

TABLE OF AUTHORITIES

Cases	PAGE(S)
<i>Bates v. City of Little Rock</i> , 361 U.S. 516 (1960)	14
<i>Bateson v. Geisse</i> , 857 F.2d 1300 (9th Cir. 1988)	17, 27
<i>Belto v. Walker</i> , 840 F.2d 1124 (3d Cir.), cert. denied, 488 U.S. 851 (1988)	passim
<i>Boddie v. Connecticut</i> , 401 U.S. 371 (1971)	14
<i>Bowers v. Hardwick</i> , 478 U.S. 186 (1986) . . .	13-14
<i>Brady v. Town of Colchester</i> , 863 F.2d 205 (2d Cir. 1988)	passim
<i>Chiplin Enters., Inc. v. City of Lebanon</i> , 712 F.2d 1524 (1st Cir. 1983)	13, 25-26
<i>Condor Corp. v. City of St. Paul</i> , 912 F.2d 215 (8th Cir. 1990)	18, 27
<i>Creative Environments, Inc. v. Estabrook</i> , 680 F.2d 822 (1st Cir.), cert. denied, 459 U.S. 989 (1982)	13, 25-27
<i>Daniels v. Williams</i> , 474 U.S. 327 (1986) . . .	passim
<i>Davidson v. Cannon</i> , 474 U.S. 344 (1986) . .	12
<i>Dent v. West Virginia</i> , 129 U.S. 114 (1889)	12
<i>Estate of Himelstein v. City of Fort Wayne, Ind.</i> , 898 F.2d 573 (7th Cir. 1990)	17, 28
<i>Graham v. Connor</i> , 490 U.S. 386, 109 S. Ct. 1865 (1989)	11-13, 16
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965)	14
<i>Harper v. Virginia State Bd. of Elections</i> , 383 U.S. 663 (1966)	14

	PAGE(S)
<i>Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence</i> , 927 F.2d 1111 (10th Cir. 1991)	19, 28
<i>Littlefield v. City of Afton</i> , 785 F.2d 596 (8th Cir. 1986)	17, 27
<i>Loving v. Virginia</i> , 388 U.S. 1 (1967)	14
<i>Lynch v. Household Finance Corp.</i> , 405 U.S. 538 (1972)	15
<i>MacKenzie v. City of Rockledge</i> , 920 F.2d 1554 (11th Cir. 1991)	17
<i>Marks v. City of Chesapeake, Va.</i> , 883 F.2d 308 (4th Cir. 1989)	19
<i>Monroe v. Pape</i> , 365 U.S. 167 (1961)	26
<i>Moore v. City of East Cleveland</i> , 431 U.S. 494 (1977)	passim
<i>Nectow v. City of Cambridge</i> , 277 U.S. 183 (1928)	passim
<i>Neiderhiser v. Borough of Berwick</i> , 840 F.2d 213 (3d Cir.), cert. denied, 488 U.S. 822 (1988)	19
<i>New Burnham Prairie Homes, Inc. v. Village of Burnham</i> , 910 F.2d 1474 (7th Cir. 1990)	28
<i>Newman v. Massachusetts</i> , 884 F.2d 19 (1st Cir. 1989), cert. denied, 439 U.S. 1078 (1990)	24
<i>Nollan v. California Coastal Comm'n</i> , 483 U.S. 825 (1987)	15
<i>Palko v. Connecticut</i> , 302 U.S. 319 (1937) .	11
<i>Parratt v. Taylor</i> , 451 U.S. 527 (1981) . . .	22, 26
<i>Paul v. Davis</i> , 424 U.S. 693 (1976)	22
<i>PFZ Properties, Inc. v. Rodriguez</i> , 739 F. Supp. 67 (D.P.R. 1990)	1

	PAGE(S)
<i>PFZ Properties, Inc. v. Rodriguez</i> , 928 F.2d 28 (1st Cir.), cert. granted in part, — U.S. —, 60 U.S.L.W. 3359 (1991) .	1, 13, 25
<i>Regents of Univ. of Mich. v. Ewing</i> , 474 U.S. 214 (1985)	passim
<i>Rochin v. California</i> , 342 U.S. 165 (1952) .	16
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	14
<i>San Diego Gas & Elec. Co. v. City of San Diego</i> , 450 U.S. 621 (1981)	15
<i>Sanderson v. Village of Greenhills</i> , 726 F.2d 284 (6th Cir. 1984)	19
<i>Scott v. Greenville County</i> , 716 F.2d 1409 (4th Cir. 1983)	passim
<i>Screws v. United States</i> , 325 U.S. 91 (1945)	22
<i>Shapiro v. Thompson</i> , 394 U.S. 618 (1969) . .	14
<i>Shelton v. City of College Station</i> , 754 F.2d 1251 (5th Cir. 1985), cert. denied, 477 U.S. 905 (1986)	19
<i>Sinaloa Lake Owners Ass'n v. City of Simi Valley</i> , 882 F.2d 1398 (9th Cir. 1989), cert. denied, 494 U.S. 1016 (1990)	19
<i>Spence v. Zimmerman</i> , 873 F.2d 256 (11th Cir. 1989)	17
<i>State of Washington, ex rel Seattle Title Trust Co. v. Roberge</i> , 278 U.S. 116 (1928) .	14-15
<i>Village of Arlington Heights v. Metro Housing Dev.</i> , 429 U.S. 252 (1977)	passim
<i>Village of Belle Terre v. Boraas</i> , 416 U.S. 1 (1974)	passim

	PAGE(S)
<i>Village of Euclid v. Amber Realty Co.</i> , 272 U.S. 365 (1926)	passim
<i>Wolff v. McDonnell</i> , 418 U.S. 539 (1974) .	12
<i>Zinerman v. Burch</i> , 494 U.S. 113, 110 S. Ct. 975 (1990)	passim
Constitution, Statutes and Federal Rule	
U.S. CONST. amend. XIV	passim
23 L.P.R.A. § 72d	8
28 U.S.C. § 1254(1)	2
42 U.S.C. § 1983	passim
FED. R. CIV. P. 12(b)(6)	4
Law Reviews	
Rosalie B. Levinson, <i>Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process</i> , 16 U. Dayton L. Rev. 313 (1991)	21

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PFZ PROPERTIES, INC.,

v.

Petitioner,

RENE ALBERTO RODRIGUEZ, *et al.*,

Respondents.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT**

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit ("Court of Appeals") is reported in *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28 (1st Cir.), *cert. granted in part*, ___ U.S. ___, 60 U.S.L.W. 3359 (1991), and is reprinted in the Joint Appendix at 502. The order of the Court of Appeals denying rehearing is not reported. That order is reprinted in the Joint Appendix at 513. The Court of Appeals affirmed the decision of the United States District Court for the District of Puerto Rico ("the District Court") in *PFZ Properties, Inc. v. Rodriguez*, 739 F. Supp. 67 (D.P.R. 1990). The District Court's opinion and order is reprinted in the Joint Appendix at 479 (hereinafter "JA at ___").

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). Petitioner seeks review of a decision by the Court of Appeals affirming the dismissal by the District Court of claims made by petitioner arising under the United States Constitution and federal law. The Court of Appeals denied petitioner's appeal on March 18, 1991. Petitioner's request for a rehearing by the Court of Appeals was denied in an order entered on April 23, 1991. This Court granted PFZ's petition for a writ of certiorari on November 12, 1991.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case concerns petitioner's attempts to vindicate its rights to due process under the United States Constitution. The constitutional provision involved is the Fourteenth Amendment. The relevant portions of the Fourteenth Amendment (Sections 1 and 5) provide:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The statutory provision involved in the case is 42 U.S.C. § 1983. It provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

I. STATEMENT OF THE CASE

A. Procedural History

This case arises out of a dispute over the development of a large residential and tourist project in an area known as Vacía Talega in the Commonwealth of Puerto Rico. Petitioner's complaint was filed in December 1987 in the District Court under 42 U.S.C. § 1983. An amended complaint was filed in October 1988. It alleged, *inter alia*, that the respondents René Rodríguez and the Regulations and Permits Authority of the Commonwealth of Puerto Rico ("ARPE" or "the Agency") had violated petitioner's right to substantive due process under the Fourteenth Amendment.¹ This claim arose from alleged deliberate misconduct by ARPE and Rodríguez, the former Administrator of ARPE. Accordingly,

¹JA at 131-39.

Rodriguez was sued in his individual capacity. Because injunctive relief was sought from ARPE, the current Administrator of the Agency, Salvador Arana, was sued in his official capacity.

Discovery was completed and the final pretrial order was entered in December 1989. Following the entry of the same, the District Court granted a motion to dismiss the amended complaint pursuant to FED. R. CIV. P. 12(b)(6) for failure to state a claim. PFZ filed a timely appeal. The Court of Appeals affirmed the dismissal on March 18, 1991. Petitioner sought a rehearing, which request was denied on April 23, 1991. This Court granted PFZ's petition for a writ of certiorari on November 12, 1991.

B. Facts Material to the Question Presented

PFZ owns a large tract of land in Puerto Rico in an area known as Vacía Talega, which it purchased in 1960. In May 1976, the Planning Board of Puerto Rico ("Planning Board") adopted a resolution approving a development project for this parcel, which first had been proposed by PFZ in 1970. The Planning Board is the Commonwealth agency which has discretionary authority to make site-specific land use policy decisions in Puerto Rico. According to the resolution approving the project, development was to proceed in two sequential phases, the first of which was to include approximately 500 hotel rooms, 1,952 residential apartment units, and 1,104 condo-hotel apartment units.

Controversy surrounding the project led to a challenge of the Planning Board approval in the Puerto Rican courts. The Superior Court of Puerto Rico affirmed the Planning Board's resolution in September 1977. In January 1978, the Supreme Court of Puerto Rico declined to review the Superior Court's decision.

PFZ thereupon timely submitted plans for the development of the first phase of the project to ARPE, another agency

of the Puerto Rican government. ARPE approves development plans consistent with Planning Board resolutions. It also issues construction permits based upon construction drawings submitted by developers consistent with approved development plans. ARPE's permit issuing functions are ministerial in nature.

In February 1981, ARPE approved PFZ's development plans by formal resolution. Pursuant to that resolution, in February 1982, PFZ timely filed construction drawings with ARPE for the first section of the project. This triggered ARPE's statutory duty to process the drawings by performing a technical review of them and issuing a construction permit. In March 1982, ARPE confirmed to PFZ in writing that it had received the required construction drawings and that it had sent the drawings to a regional office for processing.

Over the next several years, PFZ inquired regularly about the status of ARPE's review. At no time was PFZ advised that there were any deficiencies in the drawings. By the end of 1985, however, PFZ had yet to receive any technical feedback on its drawings.² PFZ therefore made a direct inquiry in January 1986 to the new Administrator of ARPE, Lionel Motta. Motta responded by ordering his subordinates to investigate the matter.

As a result of that investigation, and consistent with ARPE's ordinary procedures, a letter officially notifying PFZ of the status of its drawings and additional information required to complete their processing was prepared and signed by Motta on behalf of ARPE in February 1987. Motta retired two days later. His subordinates, however, never sent the notice letter to PFZ or notified PFZ of the action taken.

²By ARPE custom, practice and procedure, construction drawings were processed to conclusion through a back-and-forth technical exchange of comments and revisions between the proponent's engineers and ARPE technicians.

Motta was succeeded by the Deputy Administrator, respondent René Rodríguez, who became Acting Administrator. As a political appointee, Rodríguez served at the pleasure of the Governor.³ In the wake of Motta's retirement, Rodríguez and his senior deputies embarked upon a deliberate, orchestrated course of conduct intended to delay indefinitely the processing of PFZ's drawings and the issuance of the construction permit. During the remainder of 1987, these senior ARPE officials, acting under the personal direction of Rodríguez, prevented the processing of PFZ's drawings and refused to respond to written and verbal inquiries regarding their status. Consistent with this conduct, when Rodríguez was advised of the existence of the February 1987 notice letter, he ordered a senior deputy to remove it from the project file and give it to his secretary to conceal in a locked file cabinet to which only she and Rodríguez had access.⁴

In December 1987, the president of PFZ met privately in the Governor's offices with Amadeo Francis, a Special Advisor to the Governor of Puerto Rico. Although Francis had no official responsibilities with respect to ARPE functions, PFZ was advised that he was "handling" the Vacía Talega matter.⁵ At the meeting, Francis advised PFZ that the Governor previously had decided to keep the development

³Rodríguez was appointed Administrator later that year.

⁴The existence of the notice letter was not discovered by PFZ until the deposition of René Rodríguez in June 1989. Its contents were not revealed until a copy was produced by ARPE just before the close of discovery in November 1989. In his deposition, Rodríguez acknowledged that the execution of the letter was an official act, which should have been carried out. The letter is discussed in the District Court opinion. JA at 482-83.

⁵In fact, unbeknownst to PFZ, Francis had been selected by the Governor to chair an ad hoc interagency group to handle Vacía Talega. See JA at 78-81.

from going forward for personal, political reasons, and that the project would not be resolved on the merits.⁶

This was wholly inconsistent with the legal status of the project. The Planning Board had approved the project and had recently confirmed its approved status. The ARPE Administrator had presented a written report to the Puerto Rican Senate in October of 1986 confirming ARPE's understanding to the same effect. The matter was thus beyond any stage of policy review, and the only legitimate inquiry for ARPE was into the technical merits of drawings submitted for processing.⁷

Based on Francis' disclosure and the continued stonewalling by ARPE, PFZ filed its original complaint in the District Court on December 28, 1987. The complaint alleged that ARPE's continued refusal to process the construction drawings and issue the associated permits constituted a violation of PFZ's rights to substantive due process.

In August 1988, PFZ was informed by ARPE that it would not receive a construction permit and that its case was being dismissed. ARPE also advised PFZ that, as a result of ARPE's dismissal, the 1976 Planning Board Resolution and the 1981 ARPE Resolution were no longer in effect. The decision ostensibly was premised on a finding that PFZ had never submitted any "construction drawings." This was a pretext. Senior ARPE officials, including the Deputy Administrator and the Assistant Administrator for Regional Operations, acting on instructions from Administrator Rodríguez,

⁶Respondents have acknowledged that the meeting alleged in the amended complaint occurred and that there was a discussion of a number of items with respect to the project. See *Opposition to Petition for Certiorari* at 10.

⁷As respondent Rodríguez had advised Francis in correspondence several days before Francis' December meeting with PFZ's president, ARPE did not have authority to establish public land use policy. That authority rested with the Planning Board. See JA at 87.

had conducted a sham review in which they deliberately reviewed the wrong drawings. As was alleged in the amended complaint and is now admitted by respondents, the actual construction drawings submitted by PFZ were never reviewed.⁸

Having reviewed the wrong drawings, respondents "concluded" that the construction drawings had never been submitted, so no permit could issue. It also was determined that the decision to deny the project would be made without notifying PFZ's engineers of any deficiencies and without providing any opportunity to correct the same.⁹

PFZ requested reconsideration of the decision. Administrator Rodriguez personally directed the reconsideration and responded on behalf of ARPE, denying the request. PFZ petitioned for review of ARPE's decision in the Superior Court and Supreme Court of Puerto Rico. Review in both courts was discretionary and, if granted, was limited by statute exclusively to issues of law.¹⁰ The petitions for review were denied by the Puerto Rican courts.

PFZ filed its amended complaint in federal district court in October 1988, alleging that the respondents' deliberate misconduct in denying the project and continuing to refuse to process the actual construction drawings which had been submitted deprived PFZ, *inter alia*, of its rights to substantive due process under the Fourteenth Amendment to the United States Constitution. At the completion of discovery, respondents moved to dismiss the amended complaint.

⁸ Respondents admit that the wrong drawings were reviewed, but assert that it was unintended. *See, e.g.*, Opposition to Petition for Certiorari at 11 n.13. Petitioner alleged respondents' actions were deliberate. It would be impossible to confuse the drawings that were "reviewed" with the construction drawings submitted by PFZ.

⁹ This decision was inconsistent with customary ARPE practice and procedure. *See* n.2, *supra* at 5.

¹⁰ *See* 23 L.P.R.A. §72d (Appendix to Petition for Certiorari at A-28).

The District Court granted respondents' motion to dismiss. It held that PFZ had failed to state a claim for violation of its rights to substantive due process, in light of the view repeatedly expressed by the First Circuit that controversies involving rejections of land development projects and denials of construction permits do not rise to the level of substantive due process violations.¹¹ The Court of Appeals affirmed on essentially the same grounds. On November 12, 1991, this Court granted the petition for a writ of certiorari with respect to the substantive due process claim raised by PFZ.

II. SUMMARY OF THE ARGUMENT

The Due Process Clause of the Fourteenth Amendment contains a substantive component which protects individuals from arbitrary state action. The Supreme Court has recognized that a property owner's right to devote its land to a legitimate use is protected from such arbitrary state action by the Due Process Clause. In such cases, the courts recognize a claim for substantive due process if the denial of a land use or construction permit was the result of arbitrary or illegal state action which bears no rational relationship to a legitimate state purpose.

Petitioner's amended complaint alleged that the respondents violated its rights to substantive due process when ARPE, acting at the direction of Rodriguez, arbitrarily, capriciously and illegally dismissed its project. ARPE's dismissal was premised upon a deliberate review of the wrong drawings, conduct which PFZ claims was arbitrary and capricious.

¹¹ As to PFZ's other claims, the District Court held that the post-deprivation administrative and judicial process afforded to PFZ under Puerto Rico law was constitutionally sufficient for purposes of procedural due process. It also held that PFZ's right to equal protection was not violated, even though PFZ was treated differently from other permit applicants, and even though respondents disregarded administrative procedures and denied PFZ's permit for reasons illegitimate under state law.

The purpose of this arbitrary conduct was to prevent the processing of PFZ's construction drawings and thus, to prevent PFZ from pursuing a legitimate use of its property. It bore no rational relationship to a legitimate state objective. The petitioner therefore stated a cognizable substantive due process claim.

The court below found that a violation of PFZ's substantive due process rights had not been alleged and dismissed the appeal. In doing so, it ignored this Court's recognition that the legitimate use of private property is a protected constitutional right. Moreover, it applied an approach that effectively forecloses the protection of a legitimate use even if the state action is arbitrary, capricious and for illegal reasons, unless the improper motivation is accompanied by the deprivation of a specific, *i.e.*, a fundamental, constitutional right or invidious, class-based discrimination.

Neither the Supreme Court nor a majority of the federal circuit courts have imposed such a restrictive interpretation on the Fourteenth Amendment. In contrast to the First Circuit's approach, a majority of the circuits recognize the right to pursue a substantive due process claim with respect to the arbitrary denial of a construction permit where the denial was not the product of a rational attempt to achieve a legitimate state objective. This approach is consistent with Supreme Court precedent, and has proven workable and manageable in the lower courts.

III. ARGUMENT

A. The Due Process Clause

1. The Basis for Substantive Due Process

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." This provision has been interpreted by the Court to encompass three types of

claims arising under the Due Process Clause that may be brought under § 1983.¹² *Zinerman v. Burch*, 494 U.S. 113, 125, 110 S. Ct. 975, 983 (1990). First, the Due Process Clause incorporates many of the specific protections defined in the Bill of Rights. *Id.* For example, a plaintiff may bring an action under § 1983 alleging a state official's violation of his rights to freedom of speech or freedom from unreasonable searches and seizures. *Id.*¹³ When implicated by the allegations in a complaint, the specific constitutional protection in the Bill of Rights which has been asserted serves as the guide for analyzing the claim. *See Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 1870-71 (1989) (citations omitted).

Second, the Due Process Clause encompasses a guarantee of fair procedure. Thus, a § 1983 action may be brought to remedy a deprivation of life, liberty or property which occurs in violation of procedural due process. *Zinerman v. Burch*, 494 U.S. at 125, 110 S. Ct. at 983. Such claims are evaluated on the basis of what process the state provides, and whether that process is itself constitutionally adequate. *Id.*¹⁴

Finally, the Due Process Clause includes a substantive component which bars certain "arbitrary, wrongful" government actions, "regardless of the fairness of the procedures used to implement them." *Zinerman v. Burch*, 494 U.S. at

¹²Section " '1983 is not itself a source of substantive rights,' " but rather "provides 'a method for vindicating federal rights elsewhere conferred.' " *Graham v. Connor*, 490 U.S. 386, 393-94, 109 S. Ct. 1865, 1870 (1989), quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979).

¹³*See generally Daniels v. Williams*, 474 U.S. 327, 337 & nn.4-6 (1986) (Stevens, J., concurring) (discussing incorporation and specific protections in Bill of Rights which are incorporated). The Due Process Clause incorporates those Amendments which are "implicit in the concept of ordered liberty." *See Palko v. Connecticut*, 302 U.S. 319, 325 (1937). PFZ's claim is not premised on an asserted violation of any specifically incorporated protection in the Bill of Rights.

¹⁴The Court did not grant certiorari with respect to PFZ's procedural due process claims; this discussion is solely for purposes of completeness.

125, 110 S. Ct. at 983, quoting *Daniels v. Williams*, 474 U.S. at 331.¹⁵ See also *Graham v. Connor*, 490 U.S. at 395, 109 S. Ct. at 1871 (distinguishing claims based on those Amendments in the Bill of Rights which have been incorporated into the Fourteenth Amendment from constitutional claims based on "the more generalized notion of 'substantive due process'"); *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion) (Due Process Clause not "limited by the precise terms of the specific guarantees elsewhere provided in the Constitution," but operates on a "rational continuum which . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints") (citations omitted).

The recognition of this substantive component reflects the traditional and common sense notion that the Due Process Clause, like its forebear in the Magna Carta "was 'intended to secure the individual from the arbitrary exercise of the powers of government. . . .'" *Daniels v. Williams*, 474 U.S. at 331 (citations omitted). By recognizing that the "touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), citing *Dent v. West Virginia*, 129 U.S. 114, 123-24 (1889), the Fourteenth Amendment serves to prevent the state from abusing its power or employing it as an instrument of abuse. *Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986), citing *Daniels v. Williams*, 474 U.S. at 331-33. See also *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (substantive due process protects against state action which is "arbitrary or unreasonable"); *Village of Arlington Heights v. Metro Housing Dev.*, 429 U.S. 252, 263 (1977) (Due Process Clause protects right to be free from "arbitrary or irrational" state action).

¹⁵For discussion purposes, the order of the second and third types of claims discussed in *Zinerman* has been reversed.

2. Fundamental Rights

The Court has articulated two distinct approaches when reviewing substantive due process claims that implicate rights not specifically enumerated in the Bill of Rights.¹⁶ The first approach pertains to those rights which the Court has specifically identified as "fundamental rights."¹⁷ Such fundamental rights are variously described as those "implicit in the concept of ordered liberty,"¹⁸ or those that are "deeply rooted in this Nation's history and tradition." See discussion and cases cited in *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986). They find their source implicitly in various provisions of the Constitution or in liberty interests protected by the

¹⁶With respect to enumerated rights, see *Graham v. Connor*, 490 U.S. at 393-95, 109 S. Ct. at 1870-72.

¹⁷Petitioner did not argue that it was deprived of a fundamental right. Nonetheless, the First Circuit discussed PFZ's case in the context of two prior First Circuit decisions which had framed the analysis of due process claims related to land use permits in such terms. See *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d at 31, citing *Chiplin Enters., Inc. v. City of Lebanon*, 712 F.2d 1524 (1st Cir. 1983) and *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir.), cert. denied, 459 U.S. 989 (1982). The cited cases expressed the view that a right to be free from the arbitrary denial of a permit in the land use context does not exist absent the accompaniment of a fundamental right or invidious, class-based discrimination. PFZ's protected right need not be a "fundamental" right in order to be a right protected by the Due Process Clause. See discussion, *infra* at 14-15.

¹⁸*Cf.* n.13, *supra* at 11. Specific protections incorporated from the Bill of Rights are sometimes discussed in the same general terms.

Due Process Clause.¹⁹ Fundamental rights include, for example, freedom of association,²⁰ the right to vote and to participate in the electoral process,²¹ the right to interstate travel,²² and the right to privacy.²³

The Court affords fundamental rights extraordinary judicial protection. *Bowers v. Hardwick*, 478 U.S. at 191-92. Before government can interfere with "fundamental rights," it must demonstrate (1) the existence of a compelling state interest and (2) that there are no less restrictive alternatives. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing fundamental right to marital privacy).

3. Other Protected Rights — The Right to Devote Private Property to a Legitimate Use

The rights protected by substantive due process are not limited solely to fundamental rights. The Due Process Clause protects against the deprivation of other rights implicating "life, liberty, or property," as well. Thus, within the context of substantive due process, this Court has expressly recognized that the right of a landowner "to devote its land to any legitimate use is property within the protection of the Constitution." *State of Washington, ex rel Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928). As such, the power of a state to interfere with general rights of a landowner by restricting the character of the use of his property is limited by the Due Process Clause. *Nectow v. City of Cambridge*, 277 U.S. 183, 188-89 (1928). States may not impose restrictions

¹⁹ See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965). See also *id.* at 488-93, 496 (Goldberg, J., concurring) (discussing Ninth Amendment).

²⁰ *Bates v. City of Little Rock*, 361 U.S. 516 (1960).

²¹ *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

²² *Shapiro v. Thompson*, 394 U.S. 618 (1969).

²³ See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971) (marital decisions); *Loving v. Virginia*, 388 U.S. 1 (1967) (marital decisions); *Roe v. Wade*, 410 U.S. 113 (1973) (child bearing).

that are "unnecessary and unreasonable upon the use of private property or the pursuit of useful activities." *State of Washington*, 278 U.S. at 121.

This recognition that the substantive component of the Due Process Clause protects the right of a landowner to devote his land to legitimate use is reflected in numerous decisions of the Court. See *Village of Arlington Heights v. Metro Housing Dev.*, 429 U.S. at 263; *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974); *Nectow v. City of Cambridge*, 277 U.S. at 187-88; *Village of Euclid v. Amber Realty Co.*, 272 U.S. at 395. These decisions underscore the importance which the Constitution attaches to traditional property rights. As the Court has stated, the "dichotomy between personal liberties and property rights is a false one."²⁴ *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). "In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." *Id.* See also *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987) ("[T]he right to build on one's own property — even though its exercise can be subjected to legitimate permitting requirements — cannot remotely be described as a 'governmental benefit'" (emphasis added)).

The Court also has addressed the standard of review to be applied to government conduct related to interference with the legitimate use of a landowner's property. Because the right to use one's own property has not been recognized as a "fundamental right," strict scrutiny is not employed. Instead,

²⁴ As Justice Brennan has noted, if "a policeman must know the Constitution, then why not a planner?" *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 661 n.26 (1981) (Brennan J., dissenting). See also *id.* at 633-34 (Rehnquist, J., concurring) ("If I were satisfied [that the jurisdictional requirements had been met], I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice BRENNAN.")

where the use of private property or the pursuit of useful activities with respect to private property is at issue, the Court has articulated a traditional due process standard. To establish a violation of substantive due process, a plaintiff must demonstrate that the government's action was "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."²⁵ *Village of Euclid v. Amber Realty Co.*, 272 U.S. at 395. See also *Nectow v. City of Cambridge*, 277 U.S. at 187-89; *Village of Arlington Heights v. Metro Housing Dev.*, 429 U.S. at 263; *Village of Belle Terre v. Boraas*, 416 U.S. at 8 (reaffirming *Euclid*, 416 U.S. at 3-5).

Virtually all of the federal circuit courts which have addressed substantive due process with respect to the denial of land use permits also have recognized a protected right and followed a similar analytical approach. A substantive due process claim with respect to a permit denial will be stated if the "governmental action was arbitrary, irrational, or tainted by improper motive" in that it has "no relationship to any legitimate governmental objective. . . ." *Bello v. Walker*,

²⁵The Court also has employed a due process standard which prohibits official misconduct which "shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952) (action by law enforcement officers to pump stomach of criminal defendant for evidence). *Rochin* involved a criminal arrest. As such, the Court indicated that the norm would speak not to "squeamishness or private sentimentalism about combatting crime too energetically," but rather to "hardened sensibilities." *Id.* In the context of an arrest, where physical force is often necessary, the Court judges the reasonableness of the force used with "allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving. . . ." *Graham v. Connor*, 490 U.S. at 397, 109 S. Ct. at 1872. *Rochin* sought to prohibit methods "too close to the rack and the screw" that "shock[] the conscience." 342 U.S. at 172. When addressing a protected right in the permit context, such a standard is not appropriate. And indeed, the Court has articulated a due process arbitrariness standard more appropriate for such circumstances. See, e.g., *Village of Euclid*, 272 U.S. at 395; *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 223-25 (1985).

840 F.2d 1124, 1129-30 (3d Cir.), cert. denied, 488 U.S. 851 (1988). See also *MacKenzie v. City of Rockledge*, 920 F.2d 1554, 1558-59 & n.5 (11th Cir. 1991) (city's denial of property owner's building permit would violate substantive due process if plaintiff had a protected interest in the building permit and the government deprived plaintiff of the permit " . . . for an improper motive and by means that were pretextual, arbitrary and capricious . . . " and, as such, that "necessarily lack[] a rational basis"), quoting *Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir. 1989); *Estate of Himmelstein v. City of Fort Wayne, Ind.*, 898 F.2d 573, 577 (7th Cir. 1990) (city council's refusal to issue building permit could give rise to substantive due process claim if the council's action was " . . . arbitrary and unreasonable bearing no substantial relationship to the public health, safety or welfare' ") (quoting Seventh Circuit case law citing *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) and *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926));²⁶ *Spence v. Zimmerman*, 873 F.2d at 253 (with regard to revocation of building permit, "substantive due process doctrine proscribes 'deprivation of a property interest for an improper motive and by means that were pretextual, arbitrary and capricious, and . . . without any rational basis' ") (citations omitted); *Brady v. Town of Colchester*, 863 F.2d 205, 212, 215-16 (2d Cir. 1988) (arbitrary or irrational standard met and substantive due process claim maintained where there is evidence that property owner was denied property interest in building permit not because of a good faith mistake about applicable law, but because of indefensible reason, such as political animus); *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988) (interference with protected property rights was irrational and arbitrary, and thus, substantive due process rights violated, where city had no discretion to withhold permit and building official was required to issue permit because plaintiff met all requirements for permit); *Littlefield v. City of Afton*,

²⁶The Seventh Circuit has expressed conflicting opinions on the issue. See n.38, *infra* at 28.

785 F.2d 596, 607 (8th Cir. 1986) (applicants for building permit stated substantive due process claim when they alleged the city acted arbitrarily and capriciously, with "no substantial relation to the general welfare") (citation omitted); ²⁷ *Scott v. Greenville County*, 716 F.2d 1409, 1419 (4th Cir. 1983) (intervention of county's highest governing body into what should have been the routine, ministerial issuance of a building permit by the zoning administrator to an applicant with a protected property interest in permit supported allegations of "abuse of discretion [or] caprice . . ." upon which a Fourteenth Amendment claim was properly stated)

²⁷ Cf. *Condor v. City of St. Paul*, 912 F.2d 215, 220 (8th Cir. 1990) (stating that the law is unsettled in the Eighth Circuit and elsewhere as to the parameters of substantive due process in zoning—not building permit—cases, although the "overall boundaries of substantive due process have been defined by the Supreme Court's decisions in cases raising claims of violations under 42 U.S.C. § 1983") (citations omitted).

(citation omitted).²⁸ Cf. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985) (unanimous Court endorsed an analysis tantamount to the reasonable relationship test to determine

²⁸ Additional circuits that have not been faced with claims involving building permits have recognized that the arbitrary and capricious denial of other types of land use approvals, e.g., zoning, also may implicate substantive due process. See, e.g., *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1119 (10th Cir. 1991) (review of zoning decisions in the face of a substantive due process challenge is limited to whether the decision which caused the deprivation of a protected interest was "arbitrary and capricious") (citing *Euclid*, 272 U.S. at 395, *inter alia*); *Shelton v. City of College Station*, 754 F.2d 1251, 1255-57 (5th Cir. 1985), *cert. denied*, 477 U.S. 905 (1986) (arbitrary and capricious denial of zoning variance to a property owner with protected interest in real property, having no substantial relation to the general welfare, implicates the invasion of Fourteenth Amendment due process rights) (citations omitted). See also *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1407, 1409-10 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990) (government officials' destruction of plaintiff's property based on secret decision with no legitimate basis states a claim for violation of substantive due process because it is "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare") (quoting *Euclid*, 272 U.S. at 395, *inter alia*); *Neiderhiser v. Borough of Berwick*, 840 F.2d 213, 217-18 (3d Cir.), *cert. denied*, 488 U.S. 822 (1988) (allegation that city's denial of special exemption from zoning plan was arbitrary and irrational states a viable substantive due process claim).

The Sixth Circuit, which has not been faced with either building permit or other land use substantive due process claims, has concluded that the arbitrary and capricious denial of a liberty interest in a business license can give rise to a substantive due process claim. See, e.g., *Sanderson v. Village of Greenhills*, 726 F.2d 284, 286-87 (6th Cir. 1984) (even where poolroom operator had no entitlement under state law to a license, substantive due process guarantees operator's liberty interest to engage in legal business without arbitrary interference). See also *Marks v. City of Chesapeake, Va.*, 883 F.2d 308, 312 (4th Cir. 1989) (if city council denied plaintiff's permit application to operate palmistry solely in an effort to "placate those members of the public who expressed 'religious' objections to plaintiff's proposed use of property, it thereby acted 'arbitrarily' and 'capriciously' " in violation of the Due Process Clause).

whether alleged state action was arbitrary, assuming *arguendo* a state-created property right in continued university enrollment protected by substantive due process).²⁹

The well established precedent of *Nectow*, *Euclid* and the circuit court decisions that followed suggests two basic inquiries: (1) whether the objective underlying the state action is legitimate and (2) whether the state action represents a reasonable means of achieving that legitimate purpose. Applied to a permit scenario, a developer should prevail if he presented a case involving actions aimed at him that were unrelated to the merits of the application. See, e.g., *Bello v. Walker*, 840 F.2d at 1129-30. For example, the denial of a building permit may implicate substantive due process protection if the state officials improperly interfered with the process by which building permits were issued and "they did so for partisan political or personal reasons unrelated to the merits of the application for the permits." *Id.* See also *Brady v. Town of Colchester*, 863 F.2d at 216. Such actions "can have no relationship to any legitimate governmental objective, and if proven, are sufficient to establish a substantive

²⁹Unlike the plaintiff in *Ewing*, PFZ had a protected right, i.e., to use its property for a legitimate purpose. The Court's analysis of the alleged arbitrary conduct by faculty members in *Ewing*, nonetheless, may be analogized to that of the engineers in PFZ's case. The Court in *Ewing* observed that, when asked to review the substance of a *genuinely academic* decision, courts should show great deference to the faculty's professional judgment and not override it *unless* it was "such a substantial departure from accepted academic norms as to demonstrate that . . . " the responsible actor "*did not actually exercise professional judgment*" (emphasis added). 474 U.S. at 225. The parallels to PFZ's case are readily apparent. Respondents' decision was not genuinely on the merits of PFZ's drawings and there was no actual exercise of professional judgment with respect thereto. Accordingly, the court below did not need "to trench upon the prerogatives of the state," to find a substantive due process violation. *Id.* at 226. The *Ewing* Court also suggested that the concealment of non-academic reasons and bad faith may indicate arbitrariness.

due process violation. . . . " *Bello v. Walker*, 840 F.2d at 1129-30.

4. The Limited Impact on the Courts of Constitutional Protection of Land Use Rights

In the more than half-century since the decisions in *Euclid*, *Nectow* and *State of Washington* were announced, the recognition of a protected constitutional right to use one's property for a legitimate purpose has not opened the "floodgates" of litigation in the federal courts.³⁰ Similarly, the experience of the circuit courts demonstrates that the contours of substantive due process may be drawn to accommodate both protection against the arbitrary denial of construction permits and limitation of such claims consistent with the Due Process Clause.

A number of factors operate to limit the impact on the federal courts of the constitutional protection which has been extended to land use rights. The fundamental limiting principle is the reasonable relationship test of arbitrariness described in cases such as *Nectow*, *Euclid* and *Ewing*. Implicit in the arbitrariness inquiry is deference to state actions. As suggested in *Ewing*, this deference not only protects the integrity of the federal-state relationship embodied in federalism,³¹ but also prevents the Fourteenth Amendment from becoming a

³⁰Any fear of opening the floodgates of litigation has been contradicted by the practical experience of the federal circuits over the last decade, a majority of which recognize actions such as the petitioner's. See also Rosalie B. Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process*, 16 U. Dayton L. Rev. 313 (1991) at 351-59 (discussing the effectiveness of the Court's more recent efforts to cabin the scope of substantive due process).

³¹In addressing the deference to state action, the Court in *Ewing* was faced with an additional factor, not present in the instant case, which is the importance of safeguarding the academic freedom of state and local educational institutions under the First Amendment. *Ewing*, 474 U.S. at 226.

"font of tort law to be superimposed upon whatever systems may already be administered by the States." *Daniels v. Williams*, 474 U.S. at 332; *Parratt v. Taylor*, 451 U.S. 527, 544 (1981); *Paul v. Davis*, 424 U.S. 693, 701 (1976). The standard is sufficiently rigorous that its practical effect is to discourage landowners from bringing suit in every case where they are "disappointed" with a local land use determination.

In addition to the deference extended to state actors under the reasonable relationship test, there are several other factors which serve as a meaningful limit on substantive due process claims. For example, as alleged in PFZ's case, the action complained of must be deliberate. The guarantee of due process has been "applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Daniels v. Williams*, 474 U.S. at 331. Lack of due care does not make out a deprivation by a state within the meaning of the Fourteenth Amendment, since such a standard "would trivialize the centuries-old principle of due process of law." *Id.* at 332.

Also, where state officials cause injuries in a manner indistinguishable from private citizens, constitutional issues generally are not raised. *Parratt v. Taylor*, 451 U.S. at 552-53 n.10 (Powell, J., concurring) (Mere "torts of state officials" are to be distinguished from "state action" taken "under color of state law"). Actionable deprivations must be based on "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law. . . ." *Id.*, quoting *Screws v. United*

(. . . continued)

Moreover, the Court here is not being asked to expand the federal courts' jurisdiction by creating a fundamental right for landowners. The right to devote one's land to a legitimate use free from interference by arbitrary state action has long been recognized by the Court. See discussion, *supra* at 14-15, regarding rights protected by the substantive component of the Due Process Clause.

States, 325 U.S. 91, 109 (1945) (plurality opinion of Douglas, J.).

In sum, the Court's measured approach to its role in land use issues does not diminish the federal courts' duty to intervene when a landowner's constitutional rights are infringed by local actions. *Brady v. Town of Colchester*, 863 F.2d at 215, quoting *Sullivan v. Town of Salem*, 805 F.2d 81, 82 (2d Cir. 1986). "Regardless of the deference normally accorded zoning practices by the courts, the Constitution does not tolerate arbitrary and unreasoned action." *Scott v. Greenville County*, 716 F.2d at 1420, quoting *Altaire Builders, Inc. v. Village of Horseheads*, 551 F. Supp. 1066, 1069 (W.D.N.Y. 1982) (citations omitted).

B. The Decision Below

1. PFZ Stated a Substantive Due Process Claim in a Protected Right

The essential allegations upon which petitioner relied to make out its substantive due process claim are sufficient to identify a protected right. See discussion, *supra* at 14-15. PFZ intended a legitimate use for its property, *i.e.*, the use approved by the Planning Board by formal resolution. The land use decision was upheld by the Puerto Rican courts. ARPE approved development plans based on that land use decision. Administrator Motta, respondent Rodriguez, and the Planning Board confirmed that the Planning Board's approval was in effect prior to ARPE's dismissal of the case.

Petitioner's allegations are also sufficient to state a claim for violation of its protected right. See discussion, *supra* at 15-21. PFZ alleged interference with its legitimate use of its property by individuals acting under color of state law. The Administrator of ARPE used the authority of his office to prevent PFZ's drawings from being processed, to orchestrate a sham review of the wrong drawings, and to dismiss petitioner's case.

Moreover, the state action alleged was arbitrary and capricious in that it was not reasonably related to a legitimate state objective. The Administrator of the Agency directed the deliberate review of the wrong drawings. There was and can be no legitimate, rational reason for such conduct. The action was taken to prevent the correct drawings from being processed and thus, to prevent PFZ from pursuing the legitimate use of its property described above. In no sense was this a proper objective for ARPE or Rodriguez.

Notwithstanding that these facts and allegations rose to the level of "egregiously unacceptable, outrageous conduct on the part of respondents in connection with their decision to dismiss petitioner's case . . . ,"³² and notwithstanding allegations of misconduct involving the irrational action of deliberately reviewing the wrong drawings to "justify" a dismissal which deprived PFZ of its land use approval for personal and political reasons, the First Circuit could find no basis for a substantive due process claim.³³

2. The First Circuit Committed Reversible Error by Not Recognizing PFZ's Protected Constitutional Right

During the past decade, the First Circuit consistently has ignored this Court's recognition that the right of private property owners to use their property for a legitimate purpose free from arbitrary state action is protected by the Constitution.³⁴

³²Opposition to Petition for Certiorari at 27 (respondents' characterization of petitioner's claims).

³³Paradoxically, the First Circuit has taken the more traditional approach when dealing in the context of state-created employment rights. See, e.g., *Newman v. Massachusetts*, 884 F.2d 19 (1st Cir. 1989), cert. denied, 439 U.S. 1078 (1990) (censure of tenured professor reviewed to determine whether reasonable basis existed for merits of faculty members' decision). Its refusal to do so with respect to the protected rights at issue herein cannot be reconciled with *Newman*.

³⁴Compare discussion *supra*, at 14-15 (Supreme Court precedent) with discussion *infra*, at 24-27 (First Circuit approach).

Instead, it has taken the view that claims involving arbitrary and capricious state actions which intrude upon such uses simply do not "rise to the level of violations . . . under a substantive due process label," and therefore, do not state a claim under § 1983. *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d at 32. The First Circuit has further vitiated the constitutional protection afforded legitimate uses of property by indicating that a violation of substantive due process must be accompanied by the deprivation of a specific constitutional right³⁵ or allegations of invidious, class-based discrimination.

The First Circuit's rejection of PFZ's claims was based on a long-standing position articulated in its prior decisions in *Chiplin*, 712 F.2d at 1528, and *Creative Environments*, 680 F.2d at 829-30. Its reliance on these cases to justify the dismissal of PFZ's substantive due process claim is misplaced. Neither decision discusses the constitutional protection afforded to a landowner's right to pursue the legitimate use of his property. Neither cited or discussed *Nectow* or *Euclid*. Both decisions instead speak broadly to the view that the denial of a legitimate use of private property, even if malicious, in bad faith and for invalid or illegal reasons, cannot implicate substantive due process.

More specifically, *Chiplin* held that a due process claim alleging "that [the] denial of the permit [at issue] was improperly motivated, unsupported by an allegation of the deprivation of a specific constitutional right, simply raises a matter of local concern, properly and fully reviewable in the state

³⁵As indicated in *Chiplin*, 712 F.2d at 1528, either a fundamental right or one of the incorporated rights from the Bill of Rights must be implicated.

courts" (emphasis added). *Chiplin*, 712 F.2d at 1527.³⁶ The nature of that specific constitutional right was identified in *Creative Environments* and quoted in *Chiplin*. "A 'conventional planning dispute — at least when not tainted with fundamental procedural irregularity, racial animus, or the like — . . . does not implicate the Constitution.'" *Chiplin*, 712 F.2d at 1528, quoting *Creative Environments*, 680 F.2d at 832 n.9. "Different considerations may also be present where recognized fundamental constitutional rights are abridged. . . ." *Id.*

The First Circuit seemed concerned about "maintaining a meaningful separation between federal and state jurisdiction" *Creative Environments*, 680 F.2d at 831, and that virtually every controversy involving a permit decision would end up in the federal courts. See *Chiplin*, 712 F.2d at

³⁶State post-deprivation remedies are of no consequence in the context of substantive due process actions brought under § 1983. Substantive due process violations, unlike procedural due process violations, are complete when the wrongful action is taken. *Zinerman v. Burch*, 494 U.S. at 125, 110 S. Ct. at 983. A plaintiff "may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these [substantive due process] rights" (emphasis added). *Id.*, citing generally *Monroe v. Pape*, 365 U.S. 167 (1961). Thus, any suggestion that state post-deprivation remedies obviate a substantive due process claim is clearly erroneous.

In the procedural due process context, the existence of state remedies may be relevant. "In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*" (emphasis in original). *Zinerman v. Burch*, 494 U.S. at 125, 110 S. Ct. at 983, citing *Parratt v. Taylor*, 451 U.S. at 537. Accordingly, the violation of procedural due process is not complete when the deprivation occurs, and it does not become complete unless and until the state fails to provide procedural due process. *Id.* In those circumstances where it is impossible to provide predeprivation process, the availability and adequacy of post-deprivation state remedies thus becomes relevant to a procedural due process claim. See discussion in *Zinerman*, 494 U.S. at 132-37, 110 S. Ct. at 987-89.

1527 n.4. Even if these concerns were significant as a practical matter, which they are not (see discussion, *supra* at 21-23), they do not justify a refusal to protect a constitutional right which this Court previously has recognized. The First Circuit no doubt was influenced in its approach by its erroneous view, expressed in *Creative Environments*, that a § 1983 claim for a violation of substantive due process did not exist "where a state has provided reasonable remedies to rectify legal error by a local administrative body. . . ." *Creative Environments*, 680 F.2d at 832 n.9.³⁷

Not surprisingly, the First Circuit's approach to substantive due process in land use cases has been the subject of criticism by decisions in other circuits.³⁸ The majority of the circuits has pursued approaches to substantive due process claims implicating land use permits consistent with this Court's teachings. For instance, in *Scott v. Greenville County*, the Fourth Circuit found that a property owner's substantive due process rights were violated when the Greenville County Council intervened in what should have been the ministerial issuance of a building permit by the zoning administrator. The Council called a halt to the issuance of the permit for reasons unrelated to the merits of the permit application. See also *Bateson v. Geisse*, 857 F.2d at 1302 (city council's decision to withhold building permit although all requirements

³⁷See n.36, *supra* at 26.

³⁸The divergence of the First Circuit from the majority of other circuit courts was discussed most exhaustively by the Eighth Circuit in *Littlefield v. City of Afton*, 785 F.2d at 604-07. In *Littlefield*, the Eighth Circuit joined the majority and rejected the First Circuit standard following an extensive review of the split in authority. The court in *Littlefield* explained, "[w]e are persuaded by the almost unanimous decisions of our sister circuits that the denial of a building permit under some circumstances may give rise to a substantive due process claim" (emphasis added). *Id.* at 607. Cf. *Condor Corp. v. City of St. Paul*, 912 F.2d 215, 220 (8th Cir. 1990), discussed in n.27, *supra* at 18.

(continues . . .)

had been satisfied was arbitrary and thus, violated landowner's right to substantive due process). The *Scott* court found that the landowner had a protected property interest to which federal due process protection extended, and that the intervention of the county's highest governing body, through its subordinate zoning administrator, into the routine issuance of the building permit was manifestly arbitrary and unfair. *Scott v. Greenville County*, 716 at 1418-19, 1421.

Similarly, in *Bello v. Walker*, the Third Circuit concluded that the landowner had presented evidence from which a fact finder could reasonably conclude that town council members improperly interfered with the process by which the municipality issued building permits. In *Bello*, like both *Scott* and *PFZ*, the state actors deliberately interfered in a ministerial process for "partisan political or personal reasons unrelated to the merits of the application for the permits." *Bello v. Walker*, 840 F.2d at 1129. The Third Circuit concluded that, if the facts alleged were proven, the state action could have

(. . . continued)

The *Littlefield* court identified seven circuit courts, including the Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh, which had disagreed with the First Circuit approach. These and more recent decisions are discussed *supra* at 16-19. Of these circuits, the Seventh more recently has expressed conflicting views on whether, in addition to alleging that a decision was arbitrary and irrational, there must be a showing of either a separate constitutional violation or the inadequacy of state law remedies. Compare *Estate of Himmelstein v. City of Fort Wayne, Ind.*, 898 F.2d at 577 (property owner's allegation that city council failed to acknowledge rezoning of property and refused to issue building permit judged on a standard of whether the council's actions were "arbitrary and unreasonable bearing no substantial relationship to the public health, safety or welfare") with *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1481 (7th Cir. 1990) ("in addition to alleging that the decision was arbitrary and irrational, 'the plaintiff must also show either a separate constitutional violation or the inadequacy of state law remedies'") (citations omitted). The Tenth and Second Circuits, on the other hand, apparently have decided to embrace the majority view. See *Jacobs, Visconsi & Jacobs*, 927 F.2d at 1119-20; *Brady v. Town of Colchester*, 863 F.2d at 216.

"no relationship to any legitimate government objective" and therefore, would be sufficient to satisfy a substantive due process violation actionable under § 1983. *Id.* at 1129-30.

If, as the petitioner alleges, respondents' actions were deliberate in reviewing the wrong drawings; and if, as the petitioner alleges, the objective that was sought to be achieved by that state action was not a legitimate decision on the technical merits of PFZ's drawings, but an attempt to derail an approved project; then a substantive due process violation of PFZ's protected rights has been made out under the standards articulated by this Court and embraced by the majority of the federal circuits.

The Constitution does not just protect fundamental rights, nor are its protections invoked only by invidious class-based discrimination. Abuse of power and failure of state actors to discharge their authority in a rational means related to a legitimate objective will operate more subtly, but certainly no less offensively to constitutional sensibilities and traditional notions of fair play, in the context of a permit decision. The history of substantive due process counsels "caution and restraint. But it does not counsel abandonment. . . ." *Moore v. City of East Cleveland*, 431 U.S. at 502.

IV. CONCLUSION

The First Circuit's failure to recognize a substantive due process violation with respect to PFZ's protected right to pursue a legitimate use of its property, notwithstanding facially sufficient allegations of arbitrary, capricious and illegal conduct, is inconsistent with the teachings of this Court and the majority of the other federal circuits. The Court should reverse the decision below, consistent with the precedent suggested herein, and remand this case for proceedings consistent with its decision.

Respectfully submitted,

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No. 91-122

**In the
Supreme Court of the United States**

OCTOBER TERM, 1991

PFZ PROPERTIES, INC.,

PETITIONER,

v.

RENE ALBERTO RODRIGUEZ, Et AL.,

RESPONDENTS.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT**

BRIEF FOR RESPONDENTS

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February 3, 1992

PETITION FOR CERTIORARI FILED JULY 22, 1991

CERTIORARI GRANTED NOVEMBER 12, 1991

QUESTION PRESENTED

Whether an arbitrary, capricious or illegal denial of a construction permit to a developer by officials acting under color of state law can state a substantive due process claim under 42 U.S.C. § 1983.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT	2
I. Facts On Record Relevant To The Question Presented	2
II. Procedural History	14
SUMMARY OF ARGUMENT	16
ARGUMENT	
THE ARBITRARY AND CAPRICIOUS DE- NIAL OF A CONSTRUCTION PERMIT TO PETITIONER DOES NOT TRIGGER SUB- STANTIVE DUE PROCESS PROTECTION .	18
I. Petitioner Has Not Been Deprived Of A Constitutionally Protected Interest: The Planning Board And ARPE Resolutions Are Not A Source Of That Interest.	18
II. Petitioner Has Not Shown That Respon- dents Have Deprived It Of A Constitu- tional Liberty Interest Nor Of Any Sub- stantive Constitutional Right	25
CONCLUSION	37
APPENDIX	A-1 - A-18

TABLE OF AUTHORITIES

	Page
Cases (Federal):	
<i>Albery v. Redding</i> , 718 F.2d 245, 251 (7th Cir. 1983)	24
<i>Baker v. McCollan</i> , 443 U.S. 137 (1979)	31, 32
<i>Bishop v. Wood</i> , 426 U.S. 341, 344 (1976)	19
<i>Board of Regents v. Roth</i> , 408 U.S. 564, 577 (1972)	19, 20
<i>Bowers v. Hardwick</i> , 478 U.S. 186, 191-192 (1986)	28, 31
<i>Brown v. Brienen</i> , 722 F.2d 360, 366-67 (7th Cir. 1983)	24
<i>Buhr v. Buffalo Pub. School Dist.</i> , 500 F.2d 1196, 1202 (8th Cir. 1974)	24
<i>Charles v. Baesler</i> , 910 F.2d 1349, 1353 (6th Cir. 1990)	23
<i>Cleveland Bd. of Education v. Loudermill</i> , 478 U.S. 532, 538 (1985)	18
<i>Coninston Corp. v. Village of Hoffman Estates</i> , 844 F.2d 461 (7th Cir. 1988)	33
<i>Creative Environments v. Estabrook</i> , 680 F.2d 822 (1st Cir.) <i>cert. denied</i> , 459 U.S. 989 (1982)	23
<i>Cruzan v. Director, Missouri Dept. of Health</i> , 110 S.Ct. 2841 (1990)	26, 29, 32
<i>Daniels v. Williams</i> , 474 U.S. 327, 331 (1986)	26, 30, 31, 32
<i>Davidson v. Cannon</i> , 474 U.S. 344 (1986)	32, 34
<i>Eisenstadt v. Baird</i> , 405 U.S. 438 (1972)	29
<i>Estate of Himelstein v. City of Fort Wayne</i> , 898 F.2d 573, 577 (7th Cir. 1990)	24
<i>Fair Assessment in Real Estate Assoc., Inc. v. McNary</i> , 454 U.S. 100 (1981)	32

	Page
<i>G.M. Engineers & Associates, Inc. v. West Bloomfield Townshp</i> , 922 F.2d 328 (6th Cir. 1990) ..	33
<i>Goss v. Lopez</i> , 419 U.S. 565, 573-574 (1975)	19
<i>Graham v. Connor</i> , 490 U.S. 386 (1989)	31
<i>Griswold v. Connecticut</i> , 381 U.S. 479 (1965)	29
<i>Gutzwiller v. Fenik</i> , 860 F.2d 1317, 1328 (6th Cir. 1988)	25
<i>Harding v. County of Door</i> , 870 F.2d 430 (7th Cir.) <i>cert. denied</i> , 493 U.S. 517 (1984)	33
<i>Hudson v. Palmer</i> , 468 U.S. 517 (1984)	32
<i>Lemke v. Cass County</i> , 846 F.2d 469 (8th Cir. 1986)	33
<i>Littlefield v. City of Afton</i> , 785 F.2d 596 (8th Cir. 1986)	33
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422, 430 (1982)	19
<i>MacKenzie v. City of Rockledge</i> , 920 F.2d 1554, 1559 (11th Cir. 1991)	23
<i>Memphis Light, Gas & Water Div. v. Craft</i> , 436 U.S. 1, 11-12 (1978)	19
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923)	29
<i>Michael H. v. Gerald D.</i> , 491 U.S. 110 (1989) ...	26
<i>Moore v. City of East Cleveland</i> , 431 U.S. 494 (1977)	26, 27, 28, 29, 30, 31, 36
<i>Neuwirth v. Louisiana State Bd. of Dentistry</i> , 845 F.2d 533, 558 (5th Cir. 1988)	25
<i>Nollan v. Douglas County</i> , 903 F.2d 1546, 1553-54 (11th Cir. 1990)	24
<i>Palko v. Connecticut</i> , 302 U.S. 319, 325-26 (1937)	28, 30, 31
<i>Parratt v. Taylor</i> , 451 U.S. 527 (1981)	32
<i>Paul v. Davis</i> , 424 U.S. 693 (1976)	32
<i>Pedersen v. Ramsey County</i> , 697 F.Supp. 1071, 1081 (D. Minn. 1988)	24

	Page
<i>Perry v. Sindermann</i> , 408 U.S. 593 (1972)	19
<i>Pierce v. Society of Sisters</i> , 268 U.S. 510 (1925) ..	29
<i>Polenz v. Parratt</i> , 883 F.2d 551, 558-59 (7th Cir. 1989)	24
<i>Regents of the University of Michigan v. Ewing</i> , 474 U.S. 214 (1985)	28, 29
<i>Rochin v. California</i> , 342 U.S. 165, 172 (1952) ..	26, 30
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	29
<i>Shelton v. City of College Station</i> , 780 F.2d 475, 479-83 (5th Cir.) <i>cert. denied</i> 477 U.S. 905 (1986) ..	24
<i>Sinaloa Lake Owners Ass'n v. City of Simi Valley</i> , 882 F.2d 1398 (9th Cir. 1989) <i>cert. denied</i> 110 S.Ct. 1317 (1990)	33
<i>United States v. Salerno</i> , 481 U.S. 739 (1987)	30
<i>Village of Belle Terre v. Boraas</i> , 416 U.S. 1 (1974) ..	27
<i>Village of Euclid v. Ambler Realty Co.</i> , 272 U.S. 365 (1926)	27
<i>Washington v. Harper</i> , 494 U.S. 210 (1990)	29
<i>Weimer v. Amen</i> , 870 F.2d 1400, 1406 (8th Cir. 1989)	24
<i>Yale Auto Parts, Inc. v. Johnson</i> , 758 F.2d 54 (2d Cir. 1985)	33
<i>Young v. American Mini Theatres, Inc.</i> , 427 U.S. 50 (1977)	27
<i>Youngberg v. Romeo</i> , 457 U.S. 307 (1982)	29
<i>Zinermon v. Burch</i> , 494 U.S. 113, 125 (1990) ..	26, 30
Cases (Puerto Rico):	
<i>Regulations and Permits Administration v. Ozores-Perez</i> , 116 D.P.R. 816, 16 Official Translations of the Opinions of the Supreme Court of Puerto Rico 1009, 1011 (1986)	21

	Page
<i>The Richards Group of Puerto Rico, Inc. v. Puerto Rico Planning Board</i> , 108 D.P.R. 23, 8 Official Translations 20, 25-26 (1970)	21
Constitutional Provisions And Statutes (Federal):	
U.S. Constitution Amend. XIV	1, 16, 18, 26, 29, 30, 32, 34, 35
Civil Rights Act of 1871, ch. 22 § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983) (1982)	2, 32, 33
Fed. R. Civ. P. Rule 12 (b)(6)	15
Fed. R. Civ. Rule 25(d)	3
Fed. R. Civ. P. Rule 56	15
Puerto Rico Statutes:	
P.R. Laws Ann. tit. 23 § 62a, 62d, 62f	3
P.R. Laws Ann. tit. 23 § 62 X	13
P.R. Laws Ann. tit. 23 § 71i	20
Section IV of the First Part of ARPE Manual of Procedures	8, 9
OTHERS:	
Charles F. Abernathy, <i>Section 1983 and Constitutional Torts</i> , 77 Geo. L. J. 1441 (1989)	32
Charles M. Haar & Michael Allan Wolf, <i>LAND-USE PLANNING</i> , (Little, Brown & Co.) (1989)	27
James E. Ely, Jr., <i>THE GUARDIAN OF EVERY OTHER RIGHT</i> (Oxford University Press)	34
W. Van Alstyne: <i>Cracks in "The New Property": Adjudicative Due Process In The Administrative State</i> , 62 Cornell L. Rev. 445, 487 (1977)	30

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BRIEF FOR RESPONDENTS

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional provision involved is the Fourteenth Amendment. The relevant portions of the Fourteenth Amendment (Sections 1 and 5) provide:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The statutory provision involved is The Civil Rights Act of 1871, ch. 22 § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983) (1982). The Act provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

I. Facts On Record Relevant To The Question Presented

This case concerns a dispute over the development of a tourist hotel and residential complex ("the project") on a portion of a tract of land which Petitioner PFZ Properties, Inc. owns in the area of Vacía Talega-Pinones, east of San Juan. Petitioner PFZ Properties, Inc. is a corporation chartered under the laws of the Commonwealth of Puerto Rico, doing business in Puerto Rico for over three decades as a developer. Respondents are The Puerto Rico

Regulations and Permits Administration ("ARPE"), Rene Alberto Rodriguez ("Rodriguez") and Salvador Arana.¹

In 1969, The Puerto Rico Planning Board denied PFZ's first proposal to develop a tourist hotel and residential units on its tract of land in Vacía Talega-Pinones. The Planning Board is the agency authorized by law to issue site permits allowing specific uses for undeveloped land in Puerto Rico. Unlike most other agencies, the Planning Board does not operate independently from the chief executive officer of Puerto Rico: the statute creating the Board makes it an "arm" of the Governor and attaches it to The Office of the Governor. The Governor appoints its members and also designates its Chairman.²

Among several factors which in 1969 led the Board to deny PFZ's first development proposal were the facts that the vast majority of PFZ's estate was "covered by groves, lagoons and canals which must be preserved for the purpose of protecting the ecology of the area and the production of nourishment for marine life", the estate was in an

¹ ARPE is an "arm of the state" protected by the Eleventh Amendment against suits for damages. It is a party to this lawsuit only as pertains to petitioner's claim for declaratory and permanent injunctive relief. Rodriguez was Acting Administrator of ARPE from March 1, 1987 until his appointment as Administrator on September 2, 1987. He was replaced by Arana in February 1989. Rodriguez is the sole defendant in an individual capacity. Arana automatically substituted for Rodriguez as an official capacity defendant by virtue of Fed. R. Civ. P. Rule 25(d).

² P.R. Laws Ann. tit. 23 § 62a, 62d, 62f. The Board was created for the general purpose of guiding the orderly development of Puerto Rico and to set policies in areas considered to have an impact on the general well-being of present and future inhabitants of Puerto Rico.

isolated area "not ready for urban development due to lack of the [infrastructure] necessary for the feasibility of its development . . .", the vast majority of the estate was in the floodplain and "subject to inundation due to the overflow [of a nearby major river] . . .", and PFZ had not presented to the Board a plan to finance the flood control works that needed to be undertaken if PFZ wished to develop its project in lands subject to inundation.³

In April 1970, PFZ requested that the Board reconsider its decision denying the proposal. This time around PFZ submitted to the Board a plan whereby it would develop the tract of land nearest to the ocean in two stages (sections). Under the terms of this plan, PFZ would share in the cost of building the flood control works in the proportion fixed by the Board. PFZ made a commitment to build a road to provide access to the project, as PFZ's tract of land laid in an isolated spot not served by any road in Puerto Rico.

PFZ represented to the Board that it was a bona fide developer and would be able to secure financing to build the access road and all the infrastructure works for its project. Such works, commonly known as "urbanization works", include both on-site and off-site improvements to the site. These are the works that provide a project with roads, sanitary sewer system, drinking water supply, storm sewers, electric power, and so forth.

The Board agreed to reconsider its prior denial of the proposal after PFZ assured the Board that financing for the project was in place. The Board agreed to approve the proposal subject to the condition that PFZ submit an Environmental Impact Statement ("DIA" is its Spanish acronym) to be reviewed by the Puerto Rico Environ-

³ Joint Appendix ("J.A."), 14-15.

mental Quality Board (translation into English rendered "Environment Control Board" in documents in the record of this case).

In June 1973, PFZ submitted to the Planning Board an alternate preliminary development proposal along with a DIA. The Environmental Quality Board was not satisfied that this DIA adequately documented the adverse impact on the ecologically sensitive area of the road which PFZ was to build. After considerable debate, the Environmental Quality Board determined that PFZ would have to submit another DIA, to be prepared by the Puerto Rico Highways Authority (translation into English rendered "Puerto Rican Road Authority" in documents in the record of this case).

On July 24, 1974, the Planning Board approved PFZ's alternate proposal to develop the project in two stages. The Board's approval resolution expressly noted the several conditions under which approval was being granted, among them, that PFZ comply with the Environmental Quality Board's requirement that the Puerto Rico Highways Authority prepare for its review another DIA, providing complete data on the type of access road that PFZ intended to build and specifying its route and other construction details.⁴

Soon thereafter, several families who resided in the area and claimed property rights over portions of land of PFZ's estate petitioned the Planning Board to reconsider its approval of PFZ's alternate development proposal. The Board denied the petition through a resolution issued May 14, 1976 (J.A., 13-35). The residents sought judicial review of the Board's denial of their petition for reconsideration and the Superior Court of Puerto Rico upheld the Board.

⁴ J.A., 19.

The Planning Board's May 14, 1976 resolution denying the residents' petition for reconsideration affirmed its approval of PFZ's alternate proposal to develop the first section of the project, subject to the same conditions placed on PFZ when the Board first approved the alternate proposal on July 24, 1974; chiefly among them, that PFZ build at his own cost all the infrastructure works and that it secure approval from the Environmental Quality Board for the subdivision works or any other construction works.⁵

The Planning Board's May 14, 1976 resolution noted that PFZ's alternate proposal was found to be "not totally in accord with the Plan for Use of Land and Transportation in force for the Metropolitan San Juan area . . .".⁶ As regards PFZ's proposal to develop the *second* section of the project, *which comprised the larger portion of the tract which PFZ wished to develop* (266 acres), the Board's May 14, 1976 resolution explicitly conditioned further consideration of this larger section of the project to PFZ's showing of "substantial progress on the construction works [of the first section] and to evidence that the remaining part of the first section will be finished."⁷

The Planning Board's May 14, 1976 resolution authorized PFZ to prepare "the construction blueprints for the subdivision works of the first section."⁸ The agreement reached by PFZ and the Board and embodied in this resolution explicitly served notice on PFZ that "the construction blueprints for the subdivision works of the first section" would have to be prepared within one year from the date of issuance of the resolution.⁹

⁵ J.A., 30.

⁶ J.A., 20-21.

⁷ J.A., 30.

⁸ J.A., 33.

⁹ *Id.*

This resolution reiterated that PFZ had to obtain approval (endorsement) of the Environmental Quality Board for its subdivision works.¹⁰ The Environmental Quality Board had agreed to endorse development of the first stage of the project, *subject to the condition that another DIA be submitted for its review* that adequately documented the impact on the ecologically sensitive area of the road that PFZ would build to provide access to its project.¹¹

PFZ in 1978 timely submitted for ARPE review the construction drawings for the subdivision works, which PFZ captioned "Internal Preliminary Development of Blocks For The First Section." ("Internal Preliminary Development"). Review of these subdivision works by ARPE took almost three years. William Salva was ARPE Administrator at the time and during his tenure ARPE on February 24, 1981 issued a resolution approving PFZ's "Internal Preliminary Development".

Respondents took the oral deposition of Engineer Luis Rodriguez who is a partner in "Basora and Rodriguez", the engineering firm retained by PFZ to develop the project. In Engineer Rodriguez's view ARPE took too long in approving the subdivision works because "... ARPE became involved in conceptual elements which to the best of our understanding the Planning Board had already resolved. . . ."¹² When asked if a plan for the subdivision works had been submitted for approval to the Environmental Quality Board, which was one of the conditions imposed by the Planning Board's May 14, 1976 resolution approving development of the first section of the

¹⁰ J.A., 30.

¹¹ J.A., 19.

¹² J.A., 401.

project, Engineer Rodriguez answered: "No, it was not submitted."¹³

Pursuant to the ARPE February 24, 1981 resolution approving PFZ's "Internal Preliminary Development", PFZ was authorized to submit for ARPE's review construction drawings for the urbanization works [on-site and off-site] to serve the first section of the project.¹⁴ These drawings for the urbanization works, which ARPE engineers (technicians) would be reviewing at the time, would be drawings that had been prepared following the specifications and recommendations of the relevant public bodies and approved (endorsed) by these bodies *before* their submission to ARPE for ARPE's certification of the urbanization works, after which ARPE would issue the construction permit.

Only after these drawings had obtained the approval or endorsements of the relevant public bodies would they become final drawings. ARPE's "Manual of Procedures for Processing Construction Plans and Inscription Plans for Urbanizations" provides that "[b]efore submitting the construction plans in *final* form to the consideration of the Board and/or the Regional Planning Office, the developer or planner must submit to the other governmental agencies concerned the *final* sets of plans which may be required to obtain their *final* endorsement." (J.A., 5-6) (emphasis supplied).¹⁵ The ARPE February 1981

¹³ J.A., 457.

¹⁴ The ARPE February 24, 1981 resolution was omitted from the Joint Appendix. Respondents have reproduced it as an Appendix to this Brief.

¹⁵ The Manual of Procedures was approved by the Planning Board to rule the procedures at ARPE after ARPE's creation in 1975. References to the "Board" and to "Regional Planning Office" nevertheless remained in the Manual.

resolution also called on PFZ to submit its construction drawings in *final* form (App. to this Brief, A4-A5).

The Manual of Procedures also called on PFZ to submit "[e]vidence of compliance with the Environmental Public Policy Act", if PFZ wished to obtain from ARPE preliminary authorization to proceed with the earth movement works prior to obtaining approval of the final construction plans (J.A., 3-4). "Evidence of compliance with the Environmental Public Policy Act" would entail that PFZ obtain approval for the earth moving works from the Environmental Quality Board.

The ARPE February 24, 1981 resolution allowed PFZ one year from the date of issuance of the resolution to submit the final construction drawings for urbanization works, and explicitly served notice on PFZ that if the drawings were not submitted by the deadline, ARPE's approval of PFZ's "Internal Preliminary Development" would cease to be in force and [the case] "considered abandoned and . . . sent to the files [dismissed] for all legal effects."¹⁶ Section IV of the First Part of ARPE's Manual of Procedures authorizes ARPE to dismiss a case [project] for, among other reasons, "because the effective term for the preliminary development has expired" (J.A., 9).

On February 22, 1982, that is, within the deadline set forth in the ARPE resolution, PFZ's engineers wrote a letter to then ARPE Administrator Edmundo Colon (J.A., 36-38). In this letter, Engineer Luis Rodriguez advised ARPE that it was submitting "Construction Plans for Block No. 2" along with "preliminary designs" for the structures to be erected on Block No. 2. The "preliminary

¹⁶ App. to this Brief, A-16.

designs" for structures were returned by ARPE in March 1982 because the ARPE 1981 resolution required PFZ to first obtain certification of its drawings for urbanization works.

Engineer Rodriguez's letter explicitly acknowledged that these construction drawings for Block No. 2 *were not final construction drawings*. His letter informed ARPE that the final construction drawings "... are now being prepared, and at the appropriate time we will submit them for the consideration and endorsement [approval] of the agencies mentioned [in the letter] (J.A., 38). This letter also informed ARPE that Engineer Rodriguez had yet to prepare the drawings for the off-site works required to serve the project and, thus, that these other drawings were not being submitted (J.A., 37).

A key document in the record of this case is a letter prepared and ready to be signed by former ARPE Administrator Lionel Motta ("Motta"), to be sent to PFZ's engineers on February 26 1987. Motta was respondent Rodriguez's predecessor as Administrator of ARPE. In his letter to PFZ's engineers Motta informed them that the construction drawings which had been submitted to ARPE in February 1982 lacked the "basic details about the urbanization works to serve the project" (J.A., 62). Along with this letter Motta was returning the construction drawings that had been submitted in February 1982.

Motta's letter granted PFZ's engineers one year from the date of the letter to submit the *final* construction plans for the urbanization works "as provided by Plan-

ning Board Regulation No. 12."¹⁷ The letter admonished that if the final drawings were not submitted within the deadline, "it shall be taken to mean that [the developer] has desisted from the project and this [project] shall be dismissed for all legal purposes and effects" (*Id.*).

PFZ never submitted final construction drawings for urbanization works to ARPE. As a matter of fact, these drawings were never prepared and submitted to the public bodies for their approval. From 1982 to 1986 ARPE received no inquiries from PFZ in connection with its project. The parties agreed in the Pretrial Order on the contents of documents that ARPE kept in a special, not "secret", project file (Pretrial Memorandum, 56-57).

Among these documents there are several letters from a number of public bodies answering the letters of PFZ's engineers, some dating from 1978, inquiring about facilities planned or programmed to serve the project in the near future. One of these letters informed PFZ's engineers that PFZ would have to advance to the power authority more than 50% of the cost of building power facilities for the project.

PFZ secured approval from the Planning Board for its development proposal *subject to the condition that it build all the infrastructure works*. The Planning Board's May 14, 1976 resolution explicitly noted that since PFZ proposed to develop its project in an isolated area where no infrastructure was in place, PFZ would have to build these facilities at its own cost (J.A., 25).

¹⁷ Regulation No. 12 became in force in May 1984. This regulation changed the practice at ARPE in connection with the technical review for the certification of urbanization works. Under Regulation No. 12 PFZ's engineers would themselves certify the plans and file them with ARPE. After this Regulation became in force in 1984 ARPE stopped the practice of performing a technical review of drawings to certify them.

The years went by and PFZ never made final arrangements with the Puerto Rico Highways Authority in connection with the access road it was to build. Nor were *final* plans submitted to the electric power authority or to any public body for approval of the project. In sum, PFZ never began any work on the project and did not contact ARPE until its engineers wrote Motta in January 1986 inquiring about the "technical review" of its drawings.¹⁸

Motta learned from Cruz Marcano ("Marcano"), Assistant Administrator for Regional Operations at ARPE, that PFZ had filed some "incomplete plans" (J.A., 157). According to Motta, it would be easier to deal with the technical aspects of the drawings; "the difficult part was with the planning field, and we . . . certainly didn't want to do something which might have been incorrect" (J.A., 163). Motta, of course, knew too well that by the time ARPE received PFZ's January 1986 letter PFZ's project could not be processed under "Regulation No. 12". The project would have to undergo extensive review before ARPE could issue a permit.

PFZ was aware of this fact, as ARPE informed PFZ's engineers that upon receipt of PFZ's January 1986 letter Motta had held a meeting with the public bodies to discuss the project. (J.A., 57).

PFZ, moreover, consented to have its project reviewed after September 1986. Its President and engineers at-

¹⁸ As earlier noted, ARPE stopped the practice of technical review and certification of drawings after Regulation No. 12 became in force in May 1984. ARPE sent a letter to PFZ's engineers notifying them of these changes in regulations (J.A., 43-44). PFZ's engineers never answered this letter (J.A., 459-460).

tended a meeting with the heads of the agencies that were reviewing the project.

At this meeting, PFZ's spokesman told his audience that *the project was not feasible unless PFZ obtained approval for the second section of the project*. The head of the Environmental Quality Board told Motta that a new DIA would have to be prepared and reviewed. The head of the Department of Natural Resources held the view that since the Department had designated the area as a natural preserve of mangroves, a decision on whether to approve the *second* section of the project would have to await further review. PFZ's *second* section of the project would lay on land that was 60% mangrove forest.

The head of the Planning Board was of the view that the Board had fully reviewed the project's environmental impact at the time it had approved the project in 1974. The head of the Environmental Quality Board insisted, however, that the process of review had never been completed in 1974, and called for a new DIA.

The Planning Board's Organic Act provides that ["t]he public policies and plans that may be formulated by the Environmental Quality Board shall be submitted immediately after their preliminary approval to the Planning Board so as to determine their conformance with the integral-development policies and strategies the Planning Board may have adopted." *See*, P.R. Laws Ann. tit. 23 § 62 X. The statute further provides:

If no mutual agreement is reached between both agencies as to proposals offered, the policies and plans preliminary [sic] approved by the Environmental Quality Board shall be submitted, with the positions assumed by the latter and by the Planning

Board, to the Governor. The Governor shall, if he deems it necessary, appoint a committee of three (3) persons to study the positions of both agencies. The Governor shall take proper final action.

Id.

In 1986, a bill had been introduced in the Puerto Rico Senate calling for the preservation of the mangrove forest in Vacia Talega-Pinones and requesting that funds be allocated to condemn PFZ's tract of land. In November 1987 the sponsors of this bill called on the Governor to "freeze" PFZ's project while the House of Representatives considered the bill. The Governor announced that same month that no permit decision would be made until after the Planning Board had reevaluated public policy on land uses in Vacia Talega. The Governor had already appointed a task force under the aegis of the Planning Board, and it was expected that the Board would soon formulate a policy that could accommodate the conflicting interests converging on the Vacia Talega-Pinones area.

In December 1987, the President of PFZ met with the Governor's aide on Tourism to discuss the project. The Governor's aide expressed that in light of more pressing priorities, there were no plans to acquire PFZ's lands in a condemnation proceeding. The Governor's aide told the President of PFZ that environmental regulations and policies were at odds with PFZ's wish to build the *second* section of its project. A few days after this meeting took place PFZ filed a complaint against respondent Rodriguez in the trial court below.

II. Procedural History

PFZ filed the complaint in December 1987 and alleged that Rodriguez had refused to act on PFZ's construction drawings and that his failure to approve the drawings

constituted "an illegal taking of [PFZ's] property without just compensation." (J.A., 92). Rodriguez moved the court to dismiss the complaint on the ground the "taking" claim was not ripe.

While these pleadings were under the court's advisement PFZ moved for an enlargement of time to oppose Rodriguez's motion to dismiss. Meanwhile, the ARPE Assistant Administrator for Regional Operations (Marcano) wrote a letter to PFZ's engineers telling them that PFZ's "Internal Preliminary Development" had ceased to be in force, because under the terms of the ARPE February 1981 resolution the one-year period during which PFZ had to submit final construction drawings for the urbanization works had expired, and PFZ had not submitted the requisite drawings. A similar letter went out to PFZ's engineers from the Assistant Administrator of the Technical Review Division.

After PFZ received these letters it filed an Amended Complaint and named both ARPE and Rodriguez as defendants. The Amended Complaint, which this Court is reviewing today, averred *inter alia* that defendants' "deliberate actions, including the undue delay in processing and illegal refusal to process plaintiff's 'approved' Construction Drawings since February 1983 [were] arbitrary, capricious and unreasonable, depriving plaintiff of its substantive rights to property, including vested rights, without due process of law" (J.A., 137).

Defendants answered the Amended Complaint and filed a motion to dismiss under Fed. R. Civ. P. Rule 12(b)(6). Later on, Rodriguez filed a motion for summary judgment under Fed. R. Civ. P. Rule 56. PFZ timely opposed both motions. After the parties had concluded discovery, the court approved a Pretrial Order and set the trial to commence on January 22, 1990.

On January 12, 1990, the court vacated the Pretrial Order and granted defendants' motion under Rule 12(b)(6).¹⁹ PFZ took a timely appeal and the court below affirmed the dismissal of the Amended Complaint (J.A., 502-511). PFZ filed a Petition for Rehearing which the court below denied, after which it petitioned this Court for a writ of certiorari. The Court granted the petition on November 12, 1991 to review the following question:

"Whether an arbitrary and capricious or illegal denial of a construction permit to a developer by officials acting under color of state law can state a substantive due process claim under 42 U.S.C. § 1983".

SUMMARY OF ARGUMENT

Respondents' denial of a construction permit to petitioner has not deprived it of a constitutional property or "liberty" interest. Respondents have not placed any unconstitutional restrictions on petitioner's asserted right "to devote its land to any legitimate use." Petitioner is not now asserting a "taking" claim; petitioner's claim is that respondents refused to process its project and issue a construction permit. The Planning Board and ARPE resolutions did not create a protected property interest in favor of petitioner. The Administrator of ARPE exercised his discretion and professional judgment when he refused to issue the permit, on the ground that petitioner had failed to comply with the conditions under which it had obtained initial approval for its project.

The Due Process Clause protects state-created property interests that rise to the level of a legitimate

¹⁹ J.A., 479-493.

entitlement; it does not protect unilateral expectations or abstract needs. It also protects fundamental rights or liberties. PFZ did not acquire an entitlement to the permit because it failed to comply with the several conditions that formed part of the agreements embodied both in the Planning Board and ARPE resolutions.

Assuming, *arguendo*, that petitioner had acquired a legitimate entitlement to the permit, this entitlement was lost when the Governor of Puerto Rico announced that a decision to issue the construction permit would have to await the outcome of a reevaluation of public policy on land uses in Vacia Talega. Petitioner at the time might have had other remedies available to secure its property rights in his real estate in Vacia Talega. Petitioner, however, did not have, and could not claim to have, an entitlement to the construction permit. Petitioner may not use a substantive due process theory as a device to "ripen" what appears to be an unripe "taking" claim and litigate it under the guise of official misconduct.

In dismissing petitioner's project and denying a construction permit respondents did not deprive petitioner of a "liberty" interest protected by the Due Process Clause. Petitioner concedes that the asserted right "to devote its land to any legitimate use" is not a "fundamental right." Petitioner has not shown that this asserted right comes within the scope of the sort of individual liberties that this Court has been willing to recognize in the past.

The Amended Complaint which the Court is reviewing today *was never amended to plead that Rodriguez performed a deliberate "sham" or "pretextual" review of petitioner's construction drawings.* Petitioner has stated in its brief to this Court that Rodriguez engaged in "arbitrary and capricious or illegal" conduct because he delib-

erately reviewed the wrong drawings. (Pet. Brief, 9). Whereas the Court has a duty to liberally construe the averments in petitioner's Amended Complaint, the Court most certainly is under no duty to rewrite the Amended Complaint to contain allegations of official misconduct that petitioner did *not* include in the Amended Complaint.

An expansive reading of the Due Process Clause such as urged by petitioner will radically alter the doctrines of federalism and comity in an area that is the quintessential province of state and local authorities. It will promote forum shopping and increase federal court intervention to litigate what are, essentially, claims of alleged violations of state and local development codes. The rule urged by petitioner does not strike the proper balance among the concerns of developers, local authorities and federal courts.

ARGUMENT

THE ARBITRARY AND CAPRICIOUS DENIAL OF A CONSTRUCTION PERMIT TO PETITIONER DOES NOT TRIGGER SUBSTANTIVE DUE PROCESS PROTECTION

I. Petitioner Has Not Been Deprived Of A Constitutionally Protected Property Interest: The Planning Board And ARPE Resolutions Are Not A Source Of That Interest

The Due Process Clause protects state-created property interests. The Constitution itself is not the source of property rights or interests; they are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ." *Cleveland Bd. of Education v. Louder-*

mill, 478 U.S. 532, 538 (1985); *Bishop v. Wood*, 426 U.S. 341, 344 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The hallmark of property is an individual entitlement grounded in state law, which cannot be removed except "for cause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978); *Goss v. Lopez*, 419 U.S. 565, 573-574 (1975).

Since the Court's decision in *Roth*, *ante*, property interests that receive constitutional protection are those that rise to the level of "a legitimate claim of entitlement." 408 U.S. at 577. *Roth's* companion case, *Perry v. Sindermann*, 408 U.S. 593 (1972), emphasized that "property" in the constitutional sense embraces the broad range of interests secured by "existing rules or understandings." *Id.* at 601. A person's interest in a benefit may qualify "if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit." *Id.*

In *Bishop v. Wood*, *ante*, the Court made clear that state law determines the existence of an entitlement: "[w]hether such a guarantee has been given can be determined only by an examination of the particular statute or ordinance in question." 426 U.S. at 344-45 (footnote omitted). The Court in *Bishop* was examining an ordinance on which the petitioner in that case relied as conferring an entitlement to continued employment. The ordinance merely conditioned an employee's removal on compliance with certain specified procedures. *Id.* at 345. The ordinance did not itself contain any language from which to conclude that petitioner in that case had a legitimate claim or entitlement to continued employment.

PFZ's property interest in obtaining a construction permit (more specifically, its interest in having respondents review its construction drawings and process the project)

is premised on the averment in paragraph No. 37 in the Amended Complaint that respondents had "approved [its] Construction Drawings since February 1983" (J.A., 137). However, ARPE's February 1981 resolution approving petitioner's "Internal Preliminary Development" does not give rise to a property right in the construction permit. The ARPE resolution, just like the Planning Board's 1976 resolution, granted preliminary approval that would be in force for one year. These approvals imposed on petitioner a number of conditions that had to be met within one year of the date of issuance of these resolutions. The initial approvals of petitioner's project entailed no assurance of final approval of the project.

The ARPE February 1981 resolution required that PFZ submit *within one year* the final construction drawings for urbanization works approved by several public bodies. PFZ never complied with this requirement and, therefore, its initially approved "Internal Preliminary Development" expired on the deadline set forth in the ARPE February 1981 resolution. Just as *Roth* held that a non-tenured teacher with a one-year contract of employment had no property interest in continued employment beyond the one year, the initial and conditional approvals secured by PFZ from the Planning Board and from ARPE are not a source of a property interest in the construction permit. Initial approval for petitioner's project did not guarantee final certification of the construction works with a view to issuing the permit.

The Administrator of ARPE has wide discretion in reviewing construction projects. He is empowered to grant dispensations and allow modifications when enforcing the Planning Regulations which ARPE enforces. See, P.R. Laws Ann. tit. 23 § 71i, which provides that:

The Administrator may dispense with compliance with the requirements of the Planning Regulations pursuant to the provisions thereof, in cases where the literal application of its provisions may result in the unreasonable prohibition or restriction of the enjoyment of a holding or property and it is shown to his satisfaction that said disposition will mitigate a prejudice clearly provable, and he may impose such conditions as the case may warrant for the benefit of the public interest.

See also, *Regulations and Permits Administration v. Ozores-Perez*, 116 D.P.R. 816, 16 Official Translations of the Opinions of the Supreme Court of Puerto Rico 1009, 1011 (1986), where the Supreme Court stated that the legislative intent of ARPE's Organic Act was to grant it "broad policy-making discretion . . . in the formulation and maintenance of permit-processing proceedings", and *The Richards Group of Puerto Rico, Inc. v. Puerto Rico Planning Board*, 108 D.P.R. 23, 8 Official Translations 20, 25-26 (1970), stating that the purpose of ARPE's Organic Act was to transfer the operational and enforcement duties of the Planning Board to ARPE to allow it to consider individual cases and permits, freeing the Board from these functions.

Although the Administrator of ARPE can grant dispensations from the Planning Board's Regulations, the Administrator of ARPE has no statutory authority to approve a project which has not been endorsed by one or more of the public bodies whose approval is needed under the applicable state laws. The Administrator does not formulate public policy on land uses; that function belongs to the Planning Board.

Construction in Puerto Rico is a highly regulated activity. Approvals by the Board and ARPE are expressly limited to one-year periods, so as to ensure that the agencies' extensive and time-consuming process of review of development proposals is not wasted on developers' often grandiose plans for which they have no financing in place. The agencies must have a degree of certainty that they are dealing with bona fide developers.

An expansive reading of the Due Process Clause such as urged by petitioner is bound to radically alter the character of "Our Federalism". The rule proposed by petitioner does not strike the proper balance between the federal courts' duty to afford relief to developers whose federally protected rights have been infringed, and the interests of state and local administrators of developments codes. Land-use regulation has traditionally been recognized as an activity uniquely in the domain of state and local officials. Land-use regulations generally affect a broad spectrum of persons and social interests, and local bodies are better able than federal courts to assess the benefits and burdens of these regulations.

The standard under which the court below reviewed petitioner's substantive due process claim does not leave developers at the mercy of abusive state and local officials. To require developers to show more than artful pleadings well-dressed with constitutional verbiage and adorned with the requisite adjectives "arbitrary", "capricious", "unreasonable" and so forth, will adequately guard against the constitutionalization of state and local land-use regulations. As the First Circuit has held:

"[e]very appeal by a disappointed developer from an adverse ruling by a local . . . planning board neces-

sarily involves some claim that the board exceeded, abused, or 'distorted' its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough simply to give these state law claims constitutional labels such as 'due process' or 'equal protection' in order to raise a substantial federal question under section 1983."

Creative Environments v. Estabrook, 680 F.2d 822 (1st Cir.) cert. denied, 459 U.S. 989 (1982).

Where a developer is unable to show a protected property interest in a permit, and his claim is that the planning authorities have deviated from state or local regulations, the balance should weigh in favor of the local officials absent an allegation of purposeful or invidious discrimination, or of a violation of a specific constitutional safeguard. The following cases, because of their emphasis on the *stratum* provided by state law best illustrate this principle:

In the context of a denial of a building permit at least one circuit court decision has required that a plaintiff possess a property interest in the permit under state law before substantive due process protection may attach. See, *MacKenzie v. City of Rockledge*, 920 F.2d 1554, 1559 (11th Cir. 1991) (allegation that plaintiff was arbitrarily denied a building permit in violation of substantive due process rights found without merit, since he did not have a property interest in the permit under state law). Several lower courts have refused to recognize that substantive due process protection attaches when the only rights asserted are state-created. *Charles v. Baesler*, 910 F.2d 1349, 1353 (6th Cir. 1990) (state-created contractual rights are not deeply rooted in history or tradition and

their breach is not the sort of injustice inherent in egregious abuse of government power); *Weimer v. Amen*, 870 F.2d 1400, 1406 (8th Cir. 1989) (complaint alleging nothing more than violation of state law should be dismissed); *Estate of Himmelstein v. City of Fort Wayne*, 898 F.2d 573, 577 (7th Cir. 1990) (actions of the zoning board held not irrational nor arbitrary so as to trigger substantive due process protection when government decisions are motivated by local interests, and federal courts should be reluctant to assume the role of a zoning board of appeals); *Shelton v. City of College Station*, 780 F.2d 475, 479-83 (5th Cir.) *cert. denied* 477 U.S. 905 (1986) (since zoning decisions are legislative determinations which should be given the same deference as statutes enacted by state legislatures, federal judicial interference under substantive due process is proper only if governmental body could had no legitimate reason for its decision).

Other lower courts have erected a barrier to substantive due process claims if state remedies are adequate. *Polenz v. Parratt*, 883 F.2d 551, 558-59 (7th Cir. 1989); *Albery v. Redding*, 718 F.2d 245, 251 (7th Cir. 1983); *Brown v. Brienen*, 722 F.2d 360, 366-67 (7th Cir. 1983) (substantive due process does not provide protection for state-created property interests); *Buhr v. Buffalo Pub. School Dist.*, 500 F.2d 1196, 1202 (8th Cir. 1974) (plaintiff must at least have a property or liberty interest sufficient to trigger procedural due process before substantive due process will apply); *Pedersen v. Ramsey County*, 697 F.Supp. 1071, 1081 (D. Minn. 1988) (since right is a creature of state law, even an arbitrary deprivation of this property right should not be found to violate the due process clause); *Nollan v. Douglas County*, 903 F.2d 1546, 1553-54 (11th Cir. 1990) (although a substantive due process violation occurs where an employer deprives

an employee of his job for an improper motive by pretextual, arbitrary and capricious means, plaintiff must initially prove that he possessed a property interest in continued employment); *Gutzwiller v. Fenik*, 860 F.2d 1317, 1328 (6th Cir. 1988) (a federally recognized interest in liberty or property must be impaired for substantive due process to be violated); *Neuwirth v. Louisiana State Bd. of Dentistry*, 845 F.2d 533, 558 (5th Cir. 1988) (plaintiff had to first establish a constitutionally protected interest derived from state law as a prerequisite to asserting a substantive due process violation).

These decisions are sound; as they accord due regard to state and local authorities in the administration of state law and avoid needless federal-state friction in matters that are the quintessential province of state and local authorities. "Our Federalism", that is, the nature of our constitutional system, emerged from the Constitutional Convention as the product of compromise. Federalism, as understood by the Framers of the Constitution, should not suffer further erosion on account of a judicial interpretation of the Due Process Clause that would nationalize the law of urban planning and development.

II. Petitioner Has Not Been Deprived Of A Constitutional Liberty Interest Nor Of Any Substantive Constitutional Right

PFZ seeks to have the Court discover its asserted right "to devote its land to any legitimate use" imbedded in the Due Process Clause. It nevertheless concedes that this right is not a fundamental right (Pet. Brief, 14). PFZ moreover fails to demonstrate the constitutional dimension of that right.

The Due Process Clause has been held to include a substantive component barring certain arbitrary or wrongful governmental actions "regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). In *Rochin v. California*, 342 U.S. 165, 172 (1952) the law enforcement officers' attempt to obtain evidence from a criminal defendant by pumping for stomach contents was held to be prohibited misconduct that "shocks the conscience."

Beyond protection against restrictions on the body of a person, this Court has recognized that "liberty" may in some circumstances extend beyond protections of the physical person. However, the Court has stated that "[w]ithout that core textual meaning as a limitation, defining the scope of the Due Process Clause 'has at times been a treacherous field for this Court.'" *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977)).

In *Michael H. v. Gerald D.*, a plurality of the Court expressed that "[i]n an attempt to limit and guide interpretation of the [Due Process] Clause, we have insisted . . . that the interest denominated as a 'liberty' interest be 'fundamental'[". 491 U.S. 110, 122. Along with the plurality, Justice Scalia, in a footnote joined by Chief Justice Rehnquist, emphasized the examination of historical traditions as a means of determining what asserted rights are "fundamental", 109 S.Ct. at 2342 n. 6. See also *Cruzan v. Director, Missouri Dept. of Health*, 110 S.Ct. 2859, 2860 (1990) (Scalia, J., concurring) ("It is at least true that no 'substantive due process' claim can be maintained unless the claimant demonstrates the State has

deprived him of a right historically and traditionally protected against State interference.").

The Court has been cautious when construing the term "liberty", rejecting asserted liberty interests that may arguably be of great personal significance but that transcend purely personal liberty to impact substantially on others. The Court's narrow construction of "liberty" evinces the concern that judge-made law should not circumvent Article V of the Constitution and provide judges with a device to rewrite the Constitution.

Petitioner's asserted right "to devote its land to any legitimate use" is far from "fundamental". Petitioner concedes as much (Pet. Brief at 15). To the extent that petitioner and its *amici* imply that the asserted right is one "deeply rooted in this Nation's history and tradition", *Moore v. City of East Cleveland*, 431 U.S. at 503 (plurality opinion), petitioner overstates its case and overlooks that since the beginning of this century, planning and zoning have been valid tools to promote a concept of ordered living.²⁰

Land-use regulations generally have been upheld as a valid exercise of the police power. This Court has upheld zoning ordinances that restrict an individual's use of his property, in the interest of public health, safety, morals or general welfare. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

More on point, petitioner has not shown that the right to obtain a construction permit is one "deeply rooted in

²⁰ See, generally, C. Haar & M. Wolf, *Land-Use Planning*, (Little, Brown & Co.) (1989).

this Nation's history and tradition", *Moore v. City of East Cleveland*, ante, at 503 (plurality opinion), nor that its interest in securing the permit without undue delay is "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if [this interest] were sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937). Petitioner's asserted right "to devote its land to any legitimate use", or its interest in obtaining a construction permit without delay "bears little resemblance to the fundamental interests that previously have been viewed as implicitly protected by the Constitution." *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 229-230 (1985). (Powell, J., concurring).

The Amended Complaint avers a constitutionally protected property interest in connection with respondents' review of PFZ's construction drawings and the processing of its project by ARPE. In its brief to this Court, petitioner has asserted a constitutional right "to devote its land to any legitimate use." Petitioner, however, does not characterize this right as either property or "liberty". It cites to the Court's cases on zoning restrictions on the use of land, and proposes a test to review alleged official misconduct that is incongruous in the context of a Sec. 1983 claim to redress deprivations of federally protected rights (Pet. Brief, 20). The test is simply unworkable, because defendants in Sec. 1983 actions are not generally entitled to deference, nor are their actions presumptively valid.

The majority of this Court's substantive due process decisions have identified certain "fundamental rights" with an explicit or implicit source in various provisions of the Constitution. In *Bowers v. Hardwick*, 478 U.S. 186, 191-192 (1986), the Court refused to recognize the existence of a constitutional right of privacy to engage in

homosexual conduct. In *Cruzan v. Director, Missouri Dept. of Health*, 110 S.Ct. 2841 (1990) the Court assumed the existence of a constitutional right of competent individuals to refuse life-sustaining medical treatment. *Washington v. Harper*, 494 U.S. 210 (1990) recognized an inmate's liberty interest in avoiding unwanted administration of antipsychotic drugs, and balanced it against the legitimate interests of state authorities. *Youngberg v. Romeo*, 457 U.S. 307 (1982) recognized the interest in personal security and freedom from unnecessary bodily restraint of persons committed to mental institutions. See also, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to marital privacy); *Roe v. Wade*, 410 U.S. 113 (1973) (right to terminate pregnancy); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right to use contraceptives); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (freedom from zoning ordinance restricting family integrity); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right to education of children in private schools); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to German language instruction).

In *Regents of the University of Michigan v. Ewing*, ante, the Court found it necessary to "assume the existence of a constitutionally protectible right" in continued enrollment in a medical program, and to further assume that this property interest gave rise to a substantive right under the Due Process Clause to be free from arbitrary state action, before considering whether the state had in fact acted arbitrarily. 474 U.S. at 223. Thus, even where the Court has not expressly articulated a "fundamental right", a plaintiff nevertheless must show a deprivation of constitutional magnitude.

PFZ has not made this showing. Its asserted right "to devote its land to any legitimate use" has not been articu-

lated with reliance to traditional concepts of property or of liberty. Petitioner suggests that an independent constitutional interest lurking somewhere should be recognized in its own right. In light of its reliance on the Due Process Clause itself, PFZ is asserting only a generalized right to be free from arbitrary and capricious governmental conduct.²¹

The Due Process Clause does not protect against *all* arbitrary governmental actions, but only against *certain* arbitrary, wrongful actions. *Zinerman, ante*, at 983 (quoting *Daniels v. Williams, ante*, at 331). It "prevents the government from engaging in conduct that 'shocks the conscience', or interferes with rights 'implicit in the concept of ordered liberty'." *United States v. Salerno*, 481 U.S. 739, 746 (1987) (quoting *Rochin v. California, ante*, at 172); *Palko v. Connecticut, ante*, at 325-26.

The substantive content of the Clause "is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments." *Moore v. City of East Cleveland, ante*, at 543-44 (White, J., dissenting). Because the Due Process Clause's substantive "gloss has . . . not been fixed but is a function of the process of judgment, the judgment is bound to fall differently at different times and differently at the same time through different judges." *Rochin, ante*, at 170.

²¹ This Court has yet to hold that the Fourteenth Amendment is the source of a generalized right to a "freedom from arbitrary adjudicative procedures." See, Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process In The Administrative State*, 62 Cornell L. Rev. 445, 487 (1977).

Given the absence of constitutional language to guide an interpretation of the Due Process Clause, "[s]ubstantive due process has at times been a treacherous field for this Court". *Moore v. City of East Cleveland, ante*, at 502. There should be great resistance to expand the substantive reach of the Due Process Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. *Bowers, ante*, at 194-95.

To be sure, there has been disagreement over whether substantive due process is limited to those interests that are "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed", *Palko v. Connecticut, ante*, at 325-26, or whether it extends to fundamental liberties not specified in the Constitution but "deeply rooted in this Nation's history and tradition", *Moore v. City of East Cleveland, ante*, at 503 (plurality opinion). Under either standard, however, a substantive due process claim comes to this Court with a heavy burden of justification to bear. *Bowers, ante*, and petitioner has not met this burden.

In an action under Sec. 1983 for redressing the deprivation of federally protected rights, an essential element of the cause of action is that the conduct complained of "deprive" the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. See, *Graham v. Connor*, 490 U.S. 386, 394 (1989) ("The first inquiry in any § 1983 suit is 'to isolate the precise constitutional violation with which [the defendant] is charged'"), (quoting *Baker v. McCollan, ante*, at 140).

A substantive due process claim must require the identification of a constitutional right. Otherwise, every al-

leged arbitrary or capricious governmental conduct would result in a constitutional claim. The Court's concern with trivialization of the Fourteenth Amendment has been articulated and reiterated in several of its decisions. See, *Daniels, ante*, at 332; *Davidson v. Cannon*, 474 U.S. 344 (1986); *Hudson v. Palmer*, 468 U.S. 517 (1984); *Parratt v. Taylor*, 451 U.S. 527 (1981); *Baker v. McCollan*, 443 U.S. 137 (1979); *Paul v. Davis*, 424 U.S. 693 (1976).²²

Petitioner has failed to assert anything more than an alleged violation of state regulations governing the review of construction drawings at ARPE. However, ["o]ur Constitution deals with the large concerns of the governors and the governed . . . it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels, ante*, at 332; see also, *Cruzan, ante*, at 2863 (Scalia, J. concurring) ("This Court need not, and has no authority, to inject itself into every field of human activity where irrationality and oppression may theoretically occur[.]").

Thus, whether or not ARPE could be shown to have illegally departed from its procedures cannot be determinative of whether PFZ has a substantive due process claim. Violations of state or local law do not necessarily invade federally protected rights, and a § 1983 plaintiff must point to a specific constitutional guarantee safeguarding the interest he asserts has been invaded. *Paul v. Davis, ante*, at 700; Cf. *Fair Assessment in Real Estate Assoc., Inc. v. McNary*, 454 U.S. 100 (1981) (claims of discriminatory administration of state tax system do not state cause of action under § 1983).

²² See, generally, C.F. Abernathy, *Section 1983 and Constitutional Torts*, 77 Geo. L. J. 1441 (1989).

Substantive due process must be limited to instances where a recognized constitutional interest has been infringed. The standard under which the First Circuit reviewed petitioner's substantive due process claim does not leave developers at the mercy of abusive planning authorities, and properly recognizes the role of federal courts in sec. 1983 actions in the land-use context. The standard is one that adequately affords relief to developers deprived of their federally protected rights. Under the First Circuit standard, the analysis of substantive due process claims in the land-use context shows proper regard for the interests of state and local authorities in the administration of their development codes.

Not just the First Circuit, but other circuit courts show identical concern with federalism or comity. Petitioner's *amicus* National Association of Home Builders notes that other circuits are following the First Circuit approach (Brief for this *amicus*, 8-10). This fact strongly suggests that federal courts are seeking to limit developers' forum shopping in their intent to constitutionalize their land-use grievances. See, e.g., *Coninston Corp. v. Village of Hoffman Estates*, 844 F.2d 461 (7th Cir. 1988); *Harding v. County of Door*, 870 F.2d 430 (7th Cir.) *cert. denied*, 493 U.S. 853 (1989); *G.M. Engineers & Associates, Inc. v. West Bloomfield Township*, 922 F.2d 328 (6th Cir. 1990); *Lemke v. Cass County*, 846 F.2d 469 (8th Cir. 1987); *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54 (2d Cir. 1985); *But see, Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989) *cert. denied* 110 S.Ct. 1317 (1990) (holding that existence of state remedies irrelevant if claim of substantive due process stated) and *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986) (holding existence of state remedies does not affect substantive due process claim of arbitrary conditions placed on granting a building permit).

Respondents do not dispute that the Due Process Clause, like its forebear in Magna Carta, was intended to secure the individual from the arbitrary exercise of governmental power. Neither could they dispute the centrality of the right to property in constitutional thought during the revolutionary era. "Liberty and Property" was the motto of the revolutionary movement. Arthur Lee had declared in 1775 that the right of property "is the guardian of every other right".²⁴ But the phrase "by the law of the land" in Magna Carta historically was defined largely in procedural terms, requiring simply that customary legal procedures be followed before a person could be punished for criminal offenses. The purpose of due process, then, was to protect individuals against arbitrary punishments.

This Court over a century ago rejected the view that the Due Process Clause can be used to review in this Court "the abstract opinions of every unsuccessful litigant . . . of the justice of the decision against him. . . ." *Davidson v.*

²⁴ Arthur Lee, *An Appeal To The Justice and Interests of the People of Great Britain, In the Present Dispute with America*, 4th ed. (New York, 1775), p. 14, quoted in J.W. Ely, Jr. *THE GUARDIAN OF EVERY OTHER RIGHT* (Oxford University Press) (1992) (Bicentennial Essays On The Bill of Rights) p. 26.

New Orleans, 92 U.S. 97, 104 (1878). Petitioner obtained review of Rodriguez's decision both in the Superior Court and in the Supreme Court of Puerto Rico. Neither of these found any merit in petitioner's claim that Rodriguez had illegally departed from established procedures and practice at ARPE when he dismissed petitioner's project.

Petitioner is not now asserting a "taking" claim; that claim was abandoned at the time petitioner filed its Amended Complaint. The Amended Complaint which the Court reviews today purports to trace a history of undue delays in connection with petitioner's construction drawings and the processing of its project. Paragraph No. 37 of the Amended Complaint avers that the history of "undue delays" dates back to February 1983. The first complaint, however, was filed in December 1987; and respondent Rodriguez, who petitioner seeks to hold personally liable for this history of "undue delays", had assumed his official duties at ARPE only nine months before the filing of this complaint.

That petitioner pleaded a "taking" of its property "without just compensation" in its first complaint, and afterwards abandoned this claim, raises a legitimate concern that disgruntled developers will resort to the Due Process Clause to litigate, under the guise of official misconduct, what are, in reality, unripe "taking" claims.

Petitioner's *amicus* The Institute For Justice purports to disclaim any duplicative effect of this theory of litigation, but notes that "[m]any of the lawsuits challenging arbitrary denials of property development rights allege both 'takings' claims . . . as well as substantive due process claims under the Fourteenth Amendment" (Brief for this *Amicus* at 16). The Institute For Justice precisely

articulates respondents' concern. This *amicus* states that "substantive due process is more amenable to equitable relief, such as writs of mandamus, that are often necessary to vindicate the property rights . . . [because] taking claims are not ripe until state compensation proceedings are exhausted, whereas federal substantive due process claims are ripe the moment the constitutional injury occurs" (*Id.* at 17).

Respondents urge the Court to tread with caution and restraint and avoid an expansive reading of the Due Process Clause that would allow for immediate ripening of "taking" claims. Respondents have not placed any unconstitutional restrictions on petitioner's property and petitioner has yet to exhaust its administrative remedies before the Puerto Rico Planning Board. The dismissal of its project at ARPE in August 1988 did not deprive petitioner of any economically viable use of its property in Vacia Talega; it only required petitioner to administratively reopen its case at the Planning Board and petition the Board for a variance or an exemption, or otherwise allow the Board to review the project in light of new parameters for land-uses in Vacia Talega.

Petitioner bypassed the Planning Board's remedies in favor of a lawsuit in federal court that is touted by *amicus* The Institute For Justice for its sole virtue of allowing immediate "ripening" of "taking" claims, through the device of pleading "official misconduct." "[T]he history of substantive due process", indeed, "counsels caution and restraint" — *Moore v. City of East Cleveland*, ante, at 502 (quotation omitted).

Inasmuch as petitioner has failed to identify a substantive constitutional interest in connection with its claim to a permit process free of undue delays, and in connection

with its asserted right to "devote its land to any legitimate use", respondents believe that their denial of a construction permit to petitioner does not give rise to a substantive due process claim actionable under Sec. 1983.

CONCLUSION

The decision of the First Circuit Court of Appeals should be affirmed.

Very Respectfully Submitted,

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February 3, 1992

APPENDIX

A-1

COMMONWEALTH OF PUERTO RICO
REGULATIONS AND PERMITS ADMINISTRATION
Santurce, Puerto Rico

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Case No. 71-083-Urb.

[NB: All underlining in the translation is by hand in the original text.]

**ALTERNATE PRELIMINARY DEVELOPMENT FOR
THE
FIRST SECTION HOTEL - RESIDENTIAL -
TOURIST
PROJECT IN THE BARRIO TORRECILLA
BAJA OF LOIZA**

The Puerto Rico Planning Board, through the First Extension to Report Number 72-Urb.-001-F, of *July 24, 1974*, approved an alternate preliminary development proposed by P.F.Z. Properties, Inc., for a tourist-residential project to be built on a parcel of land measuring *266.41 cuerdas*, part of a tract of land of larger capacity located at Barrio Torrecilla Baja of the Municipality of Loiza.

On *May 14, 1976*, through the Second Extension to the report cited, that Board dismissed a motion for reconsideration formulated on August 21, 1974, by Attorney Pedro J. Saade, representing residents of the sector opposed to the project in question. Through that resolution, the Board approved an alternate preliminary development for *the First Section* of the project, to be developed on a parcel with a capacity of approximately one

hundred and six (106) *cuerdas*, for a total of *two thousand* (2,000) (Two stars, written by hand) hotel rooms and *two thousand* (2,000) housing units.

The Second Section of the project will be developed on the remainder of the main property whose total capacity is 266.41 cuerdas, according to the alternate preliminary development plan approved for the First Section. This section will be developed for residential-tourist-hotel use, according to provisions and conditions stipulated in the Board's report mentioned above.

On June 22, 1976, through the Third Extension to Report Number 72-Urb.-001-F, the Planning Board dismissed a motion for reconsideration filed before it by the Office of Legal Services of Puerto Rico, Inc., representing residents opposing the aforementioned resolution.

Not agreeing with the decision taken by the Planning Board, the neighbors appealed to the Superior Court, San Juan Section, which dismissed that petition. Subsequently, in a ruling of January 4, 1978, the Honorable Supreme Court of Puerto Rico DENIED a petition for Certiorari presented before that Court. From this date [Arrow hand-drawn from the above-mentioned 1978 to "From."], the one-year validity period for the project begins.

On August 24, 1978, the proponent, through the firm Basora & Rodriguez, submitted to the consideration of this Regulations and Permits Administration an alternate preliminary development, Case Number 78-21-A-698-CPD, for the first section of the project referred to. That itself consists of the development of a plot with an approximate capacity of 79.93 *cuerdas*, divided into five areas called parcels 1, 2, 3, and 4 for hotels and residential units, as well as for related uses such as vicinal facilities and vicinal services; *parcel A* to be developed and ceded as a public facility by the developer.

The limits of the 79-93 - *cuerda* parcel proposed, correspond with those of the plot of 106 *cuerdas* described in the alternate preliminary development approved by the Board for the First Section of the project on May 14, 1976.

The alternate preliminary development submitted was examined in accord with the guidelines outlined for the development

[*urbanizacion*] of lands in Puerto Rico, in the light of the provisions of the planning regulations and norms in force, of the studies being done leading to the formulation of the Integral Development Plan for Puerto Rico, and taking into consideration the conditions stipulated in resolutions adopted by the

Planning Board, all of whose parts the proponent must comply with, and, furthermore, specially with those spelled out as follows:

(1) Because the area in which the development of this project is proposed, included within the Barrio Torrecilla Baja of the Municipality of Loiza, lacks the necessary infrastructure to serve it, all the works of public facilities and services such as access, water, electricity, sanitary sewer system, etc., will be provided by the proponent, following the recommendations and requirements of the government agencies concerned. *The movement of earth, disposal of storm water and effluents of the sanitary sewer system, will be done and disposed of, so as not to have a significant adverse effect on the ecology of the surrounding area, in the preparation of the final construction plans required*

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ARPE

CASE NO. 71-083-URB.

for any of the works to serve this project, attention will be paid to compliance with the conditions and requirements established by the Planning Board, the Regulations and Permits Administration, and the other government agencies concerned.

(2) Immediate access to be provided to the project will be provisional, using the existing road, and maintaining as much as possible the current alignment, easement, and grade, and in conformity to what is indicated in the alternate preliminary development plan which this document approves.

(3) *The vehicular traffic capacity of that access will be that which the Department of Transportation and Public Works may fix.* That capacity will be used to determine the number of housing and hotel units for which this Administration will issue a construction permit. Upon reaching the traffic volume fixed by that agency, without the totality of the units permitted by the Board having been approved, additional construction permits will only be authorized in proportion to the traffic capacity added through improvements to the provisional access, or with the construction of any other alternate access route.

(4) The road to be designed and built with the capacity required to satisfy the traffic volume to be generated by the totality of the housing and hotel units authorized by means of this report, as stipulated in Clause Number 3, will take into consideration the preponderant character of open spaces, conservation or recreation

areas of the sector to serve in its extension, the need to protect the *adjoining mangroves*, and [the need] to avoid the works constituting an *obstruction* to the *free flow of the waters coming from floods of the Rio Grande de Loiza*. [All of # 4 marked by hand in margin, illegible letters, then letters "J.C.A."]

(5) It will be the responsibility of the developer to provide on his own account the *maintenance* and *upkeep* of the access road, while construction for the urbanization project lasts. To that end, the developer shall post a bond for the maintenance and upkeep of the access road, as determined by the Department of Transportation and Public Works, and/or the Municipality of Loiza. *That strip of land adjoining the ocean litoral coastline [litoral marítimo terrestre] illustrated in the alternate preliminary*

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CASE NO. 71-003-URB.

development approved by means of this resolution, will be maintained as an open space. This strip of land will be maintained free of structure, excepting those commonly related to developments of public park and beach resort areas, such as for example: benches, arbors [glorietas] [can also mean a little garden patiol, showers, dressing rooms, and pedestrian walkways. In preparing the corresponding registration plans, that strip will be labelled as open space. Those stretches of this strip of lands set to be devoted and ceded, by deed, for public use, will be accounted as part of the lands for vicinal facilities required by Planning Regulation Number 9 (Regulation on Vicinal Facilities), and in addition to the aforementioned labelling, they shall read "For Public Use" ["Dedicados a Uso Público"]. The developer will retain the title to those open spaces that are not accounted part of the vicinal facilities.

(7) In addition to those strips of lands to be devoted and ceded for public use, vicinal facilities will be provided with their corresponding lands, in the blocks designated for residential use. This area to be devoted and ceded for public use, will be proportional to the number of housing units to be built in each block. The total capacity of these areas will be limited to receiving a credit that will not exceed four (4) *cuerdas*, as part of the lands to be computed among those required for the vicinal facilities of the project. In no way does this prevent the developer

or project developer from including on his own, should he so desire it, a greater area for those purposes in each block of predominant residential use.

(8) The facilities for active recreation required by Planning Regulation Number 9 may be substituted by facilities related to the development of beach resorts, such as showers, dressing rooms, sanitary services, parking areas. These shall be located on the lands to be ceded for public use that are facing the *beach areas in the cove that is located to the west of Punta de Vacia Talega, and shall have the effect of making viable the enjoyment of the recreational use by the citizenry in general on those beaches.*

(9) *Spaces or locales will be provided for commercial use, local in character, in accord with Planning Regulation Number 9, forming*

part of the main buildings, or annexed to those primarily devoted to hotel use.

(10) Together with the construction plans for the urbanization works, the developer shall submit to this Regulations and Permits Administration, for its information, *a program and time-table for the construction of the urbanization work, and for the housing units and hotel rooms of this first section, as well as, information on agreements that have been made to provide the required infrastructure and basic services.* [Number 10 circled, paragraph marked in margin.]

(11) The developer will submit, furthermore, to the consideration of this Administration, a program or time-table for the development and construction of the project's vicinal facilities, so that in occupying the first building for residential use, its dwellers will be able to have the minimum required facilities.

(12) [Number circled] Because this a project proposed to develop as a hotel-tourist-residential complex, only segregations [*segregaciones*] corresponding to the requirements of Planning Regulation Number 9

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(Vicinal Facilities), and those essential to facilitate their financing will be authorized. Both sorts [of segregations] will accord in their delimitations, development, and use, with what is set forth in the internal preliminary design that the Regulations and Permits Administration may approve, with the endorsement of the *Tourism Development Corporation*, for the different blocks included in the first section of the alternate development approved by this resolution.

(13) Building design and construction

(a) Total housing and hotel units

Buildings will be designed and built to include the number of housing and hotel units that are authorized by this resolution, as well as those others that might be reconverted from hotel to housing, as may subsequently be determined.

(b) Reconversion of hotel rooms to housing units

The proposed conversion of one thousand five hundred (1,500) hotel rooms to residential apartment units under the principle of condo-hotel is allowed. These will be distributed proportionately among the blocks, the five hundred (500) remaining rooms will be located among the blocks to be developed for predominant hotel use. Each hotel room will be

equivalent to 0.4 basic housing unit. The totality of the condo-hotel units will be exclusively for hotel use, because the development concept is hotel-tourist.

(c) Height of buildings in the environs of the Coastal Zone

The height of buildings to be built in the plots located in the environs of the Coastal Zone, will be limited to that which produces a minimum shade effect on the beach area, and, furthermore, will conform to the applicable regulatory provisions.

(d) In the design of the residential buildings, one will take into consideration the location and development of the vicinal facilities that must be provided on the same plot.

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APRE

CASE NO. 71-083-URB.

(e) Construction area, occupied area, patios, parking, and other regulatory provisions.

For all those regulatory provisions that govern the construction of buildings, not individually specified in this resolution, those established by the Regulation on Zoning for R-5 Residential Districts and for hotels, and by any other applicable regulation in effect, will be followed.

(f) Certification of Plans

Before certification of the structures, approval of the construction plans for the urbanization works to serve the project shall have been obtained, which [*las cuales*, referent unclear] shall be submitted to the consideration of the corresponding Regional Office.

On all plan certifications it must be clearly verified that there has been compliance with all the requirements stipulated for the project by the Planning Board, this Regulations and Permits Administration, *and any other public agency concerned.*

(14) Other Conditions [Number circled and starred.]

(a) *Before authorization of any work of urbanization or construction of a building, there shall be presented a plan endorsed by the Environmental Quality Board for provision of services of collection and disposal of solid wastes originating in the project.*

(b) *There will be no spraying of insecticides or chemical compounds designed to kill insects that might effect the natural life of the mangrove zone outside the area of the project under consideration, or that might extend and affect those zones.*

(c) Ramps shall be provided on the sidewalks that facilitate movement of the handicapped in wheelchairs, [with] canes, or other medical equipment, at the crosswalks of streets, or pedestrian walkways, according to Resolution JP-221 adopted by the Puerto Rico Planning Board on March 24, 1976. These ramps shall be built on the corners formed by street intersections, or in strategically selected places, and shall have a grade not greater than five per cent (5%), with a width equivalent to the sidewalks on which they are built. The detail

of those ramps shall be included in the construction plans required for this project.

There follows a breakdown of the preliminary alternate development presented to the Technical Review Office of the Regulations and Permits Administration for this project, which includes around 500 hotel rooms, and 3,056 housing units (1876.6 basic units), distributed in 1,952 residential apartments (1366.2 basic units), and 1,104 condo-hotel apartments (510.4 basic units).

USE	CUERDAS (APROX.) PER CENT	
Residential	16.03	20.06
Hotel, Condo-Hotel	11.35	14.20
Streets and accesses	11.69	14.63
Vicinal facilities in residential centers	3.17	3.97
Open spaces	17.46	21.84
Areas to be developed and ceded for public use	10.49	13.12
Archaeological reserve to be ceded for public use	5.20	6.51
Vicinal services		

and accessory uses	<u>4.54</u>	<u>5.67</u>
TOTAL	79.93	100.00

By means of this document, taking into consideration the foregoing, and by virtue of the provisions of Administrative Orders ARP No. 8 of October 24, 1975, and APR No. 77-13 of December 1, 1977, and in harmony with what is established in Law Number 76 of June 24, 1975 of the Regulations and Permits Administration, the Assistant Administrator of the Technical Review Office of this Administration APPROVES the alternate preliminary development for Case No. 78-21-A-698-CPD, related to a hotel-tourist-residential

project (Vacía Talega), that is located in the Barrio Torrecilla Baja of Loiza, and AUTHORIZES preparation of the construction plans in the fashion required in this report, and in accord with the preliminary development plan approved.

This resolution [*acuerdo*] will be in effect for the period of one (1) year, from the date of notification of this report. UNDERSTANDING, that if the construction plans are not submitted within the period indicated, the case will be considered abandoned, and it will be SENT TO THE FILES for all legal effects.

ORDERED THAT: (1) the vicinal facilities shall be provided in accord with the provisions of Planning Regulation Number 9, and as this report indicates; (2) the preliminary development of those facilities shall be submitted within the effective time period granted for this project; (3) the other indications, recommendations, and requirements and/or provisions indicated in previous resolutions not altered by this report, maintain all their force and effect; (4) the proponent shall notify this Administration of any transaction in which the lands may be involved, to make the corresponding annotations or changes in the case file, within a period of three (3) months, from the date on which that transaction is made; (5) the foregoing requirements that are considered necessary by this Administration to make this project viable, are subject to review [can also mean: revision] from time to time, as the conditions vary; (6) any party affected may request a reconsideration of the action

taken, as expressed in this document, by the Assistant Administrator of the Technical Review Office of this Administration, within the thirty (30) days following the date of notification of this report, and (7) the construction plans for the urbanization works shall be submitted to the consideration of the Regional Office of the Regulations and Permits Administration at Carolina."

I CERTIFY: That the foregoing is a faithful and exact copy of the resolution [*acuerdo*] adopted by the Assistant Administrator of the Technical Review Office of the Regulations and Permits Administration, at its meeting on February 20, 1981.

For general knowledge I issue this present copy, and I notify all interested parties at the addresses registered in our files.

A-18

In San Juan, Puerto Rico, today (Stamped) Feb. 24, 1981.

[Signature]

MARIANO RODRIGUEZ
DELGADO
Authorized Employee

[Stamped box]

SAVE THESE DOCUMENTS PERMANENTLY: THEY
ARE VERY IMPORTANT FOR FUTURE ACTIONS
ON YOUR PROPERTY OR BUSINESS.

App. and/or Case Number: [By hand] 71-083 Orb.

FEB 18 1992

OFFICE OF THE CLERK

No. 91-122

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

PFZ PROPERTIES, INC.,

v.

Petitioner,

RENÉ ALBERTO RODRIGUEZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF PETITIONER

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PETITION FOR CERTIORARI FILED JULY 22, 1991

CERTIORARI GRANTED NOVEMBER 12, 1991

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
I. FACTS MATERIAL TO QUESTION PRESENTED	1
II. ARGUMENT	7
A. PFZ Has Identified And Articulated A Substantive Due Process Right Which Is Applicable To Its Claims	8
B. The Availability Of State Remedies Is Irrelevant To PFZ's Substantive Due Process Claim	12
C. PFZ's Substantive Due Process Claim Is Not A Takings Claim And Does Not Present A Ripeness Issue	12
D. Recognition Of PFZ's Right To Use Its Land Free Of Irrational Government Conduct Does Not Trench Upon State Prerogatives Or Place An Undue Burden On The Courts	16
CONCLUSION	17

TABLE OF AUTHORITIES

	PAGE(S)
Cases	
<i>Bateson v. Geisse</i> , 857 F.2d 1300 (9th Cir. 1988)	10
<i>Bello v. Walker</i> , 840 F.2d 1124 (3d Cir.), cert. denied, 488 U.S. 851 (1988)	8
<i>Board of Regents of State Colleges v. Roth</i> , 408 U.S. 564 (1972)	11
<i>City of Eastlake v. Forest City Enterprises, Inc.</i> , 426 U.S. 668 (1976)	10
<i>First English Evangelical Lutheran Church v. Los Angeles County</i> , 482 U.S. 304 (1987)	13
<i>Harris v. County of Riverside</i> , 904 F.2d 497 (9th Cir. 1990)	10
<i>Lynch v. Household Finance Corp.</i> , 405 U.S. 538 (1972)	11
<i>MacDonald, Sommer & Frates v. Yolo County</i> , 477 U.S. 340 (1986)	16
<i>Monroe v. Pape</i> , 365 U.S. 167 (1961), overruled in part, <i>Monell v. Department of Social Services</i> , 436 U.S. 658 (1978)	12
<i>Moore v. City of East Cleveland, Ohio</i> , 431 U.S. 494 (1977)	10
<i>Nectow v. City of Cambridge</i> , 277 U.S. 183 (1928)	passim
<i>Nollan v. California Coastal Comm'n</i> , 483 U.S. 825 (1987)	11
<i>Parratt v. Taylor</i> , 451 U.S. 527 (1981)	17
<i>Pennell v. City of San Jose</i> , 485 U.S. 1, 108 S. Ct. 849 (1988)	5

	PAGE(S)
<i>PFZ Properties, Inc. v. Rodriguez</i> , 739 F. Supp. 67 (D.P.R. 1990), <i>aff'd</i> , 928 F.2d 28 (1st Cir.), cert. granted in part, 112 S. Ct. 414 (1991)	2, 5
<i>Polenz v. Parrott</i> , 883 F.2d 551 (7th Cir. 1989)	8, 10, 11
<i>Sierra Lake Reserve v. City of Rocklin</i> , 938 F.2d 951 (9th Cir. 1991)	12
<i>Sinaloa Lake Owners Ass'n v. City of Simi Valley</i> , 882 F.2d 1398 (9th Cir. 1989)	8, 10
<i>State of Washington, ex rel Seattle Title Trust Co. v. Roberge</i> , 278 U.S. 116 (1928)	passim
<i>Village of Arlington Heights v. Metropolitan Housing Dev. Corp.</i> , 429 U.S. 252 (1977)	8
<i>Village of Euclid, Ohio v. Amber Realty Co.</i> , 272 U.S. 365 (1926)	passim
<i>Williamson County Regional Planning Comm'n v. Hamilton Bank</i> , 473 U.S. 172 (1985)	16
<i>Zinerman v. Burch</i> , 494 U.S. 113, 110 S. Ct. 975 (1990)	passim
Constitution, Statutes and Federal Rules	
U.S. CONST. amend. XIV	passim
23 L.P.R.A. § 42a	4
23 L.P.R.A. § 62c	2, 11
23 L.P.R.A. § 62m	11
23 L.P.R.A. § 62o	11
23 L.P.R.A. § 71 (History)	4
23 L.P.R.A. § 71d(r)	4
23 L.P.R.A. §§ 73-73c	4
42 U.S.C. § 1983	passim

	PAGE(S)
Regulations and Permits Administration Organic Act, June 24, 1975, No. 76, § 40(c)	4
FED. R. CIV. P. 12(b)(6)	2, 6
FED. R. CIV. P. 16(e)	2
FED. R. CIV. P. 16(e) advisory committee's note	2
Miscellaneous	
6A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1522 (1990)	2

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

PFZ PROPERTIES, INC.,

v.

Petitioner,

RENE ALBERTO RODRIGUEZ, *et al.*,

Respondents.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT**

INTRODUCTION

Petitioner seeks this Court's confirmation of a limited right under the Due Process Clause of the Fourteenth Amendment. That right recognizes that a state may not deprive a person of the ability to make legitimate use of his land without having a rational basis for doing so. Respondents' opposition brief ("Respondents' Brief"), like the decisions below, declines to acknowledge the existence of such a protected right with respect to construction permits. This refusal cannot be reconciled with the prior decisions of this Court and is inconsistent with the view of the majority of the circuits.

I. Facts Material to Question Presented

Respondents' Brief presents a number of factual arguments that depart from the allegations of and inferences

ascribed to the Amended Complaint by the courts below. These arguments either played no role in the decisions below or are disputed facts for the trial court, which are outside the scope of a motion to dismiss under FED. R. CIV. P. 12(b)(6). The factual allegations necessary to state a claim were set out in the Petitioner's Amended Complaint and the reasonable inferences that could be drawn therefrom.¹

The facts essential to PFZ's substantive due process claim are as follows. PFZ purchased a large tract of land in Puerto Rico. It subsequently sought, and in 1976 received, approval from the Planning Board of Puerto Rico to develop this property.² The Superior Court of Puerto Rico affirmed

¹ The posture of this case is unusual in that the Amended Complaint was dismissed and the trial date vacated by the district court one week before trial, after the pretrial order was signed. (Respondents incorrectly state that the pretrial order was vacated. Respondents' Brief at 16). In this regard, it is well-settled under FED. R. CIV. P. 16(e), that the final pretrial order constitutes a pleading which enlarges the allegations of fact set forth in an amended complaint. *See generally* 6A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1522, at 220-23 & n.6 (1990) and numerous cases cited therein. *See also* FED. R. CIV. P. 16(e) advisory committee's note (*citing with approval, inter alia*, § 1522 of WRIGHT & MILLER).

The court of appeals' decision indicated that it had not considered the pretrial order, and Petitioner requested a rehearing on this basis. The request was denied on the ground that PFZ had not raised the issue in its initial briefs and, alternatively, that there was nothing in the pretrial order on PFZ's behalf which would have changed the First Circuit's decision. Nonetheless, in drawing reasonable inferences from the Amended Complaint, the courts below have had the pretrial order available to provide context.

² The Planning Board is responsible for the establishment of policy with respect to development and land use in Puerto Rico. *See PFZ Properties, Inc. v. Rodriguez*, 739 F. Supp. 67, 69 n.4 (D.P.R. 1990), *aff'd*, 928 F.2d 28 (1st Cir.), *cert. granted in part*, 112 S. Ct. 414 (1991), *citing* 23 L.P.R.A. § 62c. As alleged in the Amended Complaint, the land use approved by the Planning Board was a development consisting of several thousand hotel and residential units. Amended Complaint ¶ 9; JA at 132-33. The Resolution detailing the specifics of the approval and use is set forth at JA 13-35. *See also* n.4, *infra*.

the Board's approval of the requested land use in 1977 and the Supreme Court of Puerto Rico denied review of the Superior Court's favorable ruling.³ It is reasonable to conclude from these allegations that the Commonwealth approved a legitimate use of PFZ's property.⁴

PFZ timely submitted development plans to the Regulations and Permits Authority of the Commonwealth of Puerto

³ Amended Complaint ¶¶ 7, 9, 10; JA at 132-33.

⁴ Respondents have not previously disputed, nor do they now dispute, that the Planning Board's 1976 approval was valid. Nothing in the record casts any doubt on that validity. Respondents' discussion of PFZ's efforts before the Planning Board from 1969 to 1976 is relevant only to demonstrate the length of time PFZ has pursued this project.

Notwithstanding any alleged authority on the part of the Governor or the Commonwealth to alter the Planning Board's determination, the record is devoid of any indication that such authority was in fact exercised. Similarly, no legislation has been enacted which would affect or relate to the claims herein.

Rico ("ARPE"),⁵ as required by the Planning Board Resolution.⁶ Those development plans were approved by formal ARPE resolution in 1981 as being consistent with the land use set forth in the Planning Board approval. Pursuant to the ARPE resolution, PFZ was authorized to submit construction drawings for site preparation.⁷ As alleged in the Amended Complaint and recounted in the district court opinion below, "PFZ *timely submitted* to ARPE construction drawings for site improvements for the subdivision works of block 2 of the first section ('the [C]onstruction [D]rawings'),

⁵ ARPE is a separate agency from the Planning Board. As set forth in the Amended Complaint, it reviews development plans and processes construction drawings for the purpose of issuing construction permits. Amended Complaint ¶¶ 4, 13, 16; JA at 132, 134. Prior to 1975, the Planning Board performed both its current functions and those of ARPE. When ARPE was created in 1975, the Puerto Rico legislature provided that, in carrying out its responsibilities, ARPE was to guarantee the "vested rights" of project proponents, which were acquired by virtue of Planning Board actions. See Regulations and Permits Administration Organic Act, June 24, 1975, No. 76, § 40(c) at 216; 23 L.P.R.A. § 71 (History).

In contrast to the Planning Board's discretionary policy responsibilities with respect to land use, see n.2, *supra*, ARPE's role is for the most part functional, *i.e.*, it implements Planning Board policy decisions. See 23 L.P.R.A. § 71d(r). For example, under current law and regulations, ARPE does not review construction drawings; it issues construction permits when the proponent's engineer certifies that the drawings are complete. 23 L.P.R.A. §§ 42a, 73-73c; Respondents' Brief at 11 n.17. The current rules evolved from the pre-certification procedures which were in effect when PFZ submitted its drawings and are illustrative of the functional nature of ARPE's permit-issuing responsibilities.

⁶ Amended Complaint ¶ 12; JA at 133.

⁷ Amended Complaint ¶ 16; JA at 134. The allegations in the Amended Complaint regarding ARPE's approval of PFZ's development plans also are not disputed by Respondents. Upon approval by ARPE, the development plans required no further approvals. See generally ARPE Manual of Procedures for Processing Construction Plans and Inscription Plans for Urbanizations ("Manual of Procedures"); JA at 1-12.

as required by the 1976 Planning Board Resolution and the 1981 ARPE Resolution" (emphasis added) (footnote omitted).⁸

ARPE refused to review the Construction Drawings submitted by PFZ.⁹ Instead, it reviewed a different set of drawings¹⁰ and used that review as a basis for dismissing PFZ's project, asserting that PFZ had never submitted the drawings required by the 1981 ARPE Resolution.¹¹ Respondents *have not disputed that they reviewed the wrong set of drawings in*

⁸ *PFZ Properties, Inc. v. Rodriguez*, 739 F. Supp. at 69-70; JA at 481; Amended Complaint ¶ 16; JA at 134. Respondents' recitation of the facts ignores this language in the district court's opinion and the Amended Complaint. Moreover, Respondents not only dispute the facts alleged, they purport to conduct an evaluation of the merits of PFZ's Construction Drawings in their brief. This entire exercise is perplexing because Respondents have admitted that ARPE did not review the Construction Drawings submitted by PFZ. The "analysis" proffered thus played no role in Respondents reaching their decision to dismiss PFZ's project. See n.12 and accompanying text, *infra*. To the extent that the merits of PFZ's Construction Drawings pose any issue, it is one for the trier of fact.

⁹ Amended Complaint ¶¶ 34, 36, 37; JA at 137. The Construction Drawings were filed in 1982, within the required one-year period, but were not acted on by ARPE for six years. These drawings are a set of "blueprints" submitted to obtain a construction permit. They bear the caption "Construction Drawings for Site Improvements."

¹⁰ These are a set of drawings of an entirely different nature and purpose, which bear the caption "Preliminary Project Plans."

¹¹ Amended Complaint ¶¶ 31, 34-37, 40; JA at 136-38. See also the district court's discussion of PFZ's factual allegations in which the district court read PFZ's August 17, 1988 request for reconsideration as "unequivocally informing ARPE that it had reviewed the wrong drawings." *PFZ Properties, Inc. v. Rodriguez*, 739 F. Supp. at 70; JA at 484; Amended Complaint ¶ 35; JA at 137. Respondents have admitted in these proceedings that the wrong drawings (*i.e.*, the Preliminary Project Plans) were reviewed. See n.12 and accompanying text, *infra*. See generally *Pennell v. City of San Jose*, 485 U.S. 1, 7-8, 108 S. Ct. 849, 855-56 (1988) (the Court may consider uncontested statements made in the course of proceedings before it, which support the allegations in a contested complaint).

reaching the decision that the project would be dismissed, although they claim that such conduct was the product of a mistake.¹² PFZ's Amended Complaint alleged that Respondents' conduct was deliberate.¹³

Although Respondents dispute certain of PFZ's allegations (*e.g.*, whether they deliberately or mistakenly reviewed the wrong drawings), these disputes are ultimately a matter for factual determination by the jury. In the context of a motion to dismiss under FED. R. CIV. P. 12(b)(6), these factual issues must be resolved in Petitioner's favor (*e.g.*, it must be assumed that the Respondents deliberately refused to review PFZ's Construction Drawings). The deliberate review of the

¹² See Respondents' Brief in Opposition to PFZ's Petition for a Writ of Certiorari at 11 n.13. Respondents do not specifically discuss in their present Brief the August 2, 1988 dismissal complained of. Their decision to deny the project was the result of Respondents' refusal to review PFZ's Construction Drawings (Amended Complaint ¶¶ 31, 34, 36; JA at 136-37), and their decision instead to review the Preliminary Project Plans, which were returned with the dismissal letter. Amended Complaint ¶ 34; JA at 137.

Despite intimations in Respondents' Brief regarding environmental concerns regarding the project, any such concerns were addressed by the Planning Board and resolved in the Puerto Rico courts. See Amended Complaint ¶ 10; JA at 133. ARPE did not rely on environmental issues as a basis for its August 2, 1988 decision.

¹³ Amended Complaint ¶¶ 36, 37; JA at 137. Respondents assert that PFZ did not allege that Respondents reviewed the wrong drawings as a "pretext." While PFZ did not specifically use the word "pretext" in the Amended Complaint, it alleged that the required drawings were submitted, that those drawings were not reviewed, that the decision to do so was deliberate and malicious, and that the decision was intended to deprive PFZ of its substantive rights in property. Construing all reasonable inferences in its favor, PFZ submits that a dismissal based on the deliberate review of the incorrect drawings could be characterized as a pretext for depriving PFZ of a permit.

wrong drawings cannot provide a rational basis for depriving PFZ of a permit for the legitimate use of its property.¹⁴

II. Argument

The legal arguments advanced by the Respondents, as well as those relied on by the court of appeals below, necessarily turn on their refusal to acknowledge that the substantive component of the Due Process Clause protects a landowner's right to pursue the legitimate use of its property. Respondents and the amici continue to advance the proposition put forth by First Circuit decisions that, unless PFZ alleges deprivation of a fundamental right, it cannot state a substantive due process claim with respect to the denial of a permit relating to the use of its land.¹⁵ In addition, they suggest that the availability of state remedies forecloses the existence of any substantive due process right, and that PFZ's claim is an unripe takings claim. These arguments overlook existing precedent and mischaracterize Petitioner's claims.

¹⁴ PFZ has asserted that ARPE's "review" was motivated by personal and political purposes. See Amended Complaint ¶ 28; JA at 136, 468-72; Brief of Petitioner ("Petitioner's Brief") at 6-7. While this provides context and a motive for the arbitrary conduct, the act of deliberately refusing to review the Construction Drawings in order to deny PFZ's project in and of itself is sufficiently lacking in a rational basis to state a substantive due process claim.

¹⁵ While Respondents dispute the existence of the protected right, they have not specifically argued that ARPE's alleged deliberate refusal to review PFZ's Construction Drawings could be rationally related to a legitimate state purpose.

Respondents have correctly set forth the issue upon which certiorari was granted. However, the Amicus Brief of the Council of State Governments has misstated it in terms of "unreasonable delay." While ARPE to this date has yet to process the actual Construction Drawings which were submitted, a decision nonetheless was made by ARPE. See Amended Complaint ¶¶ 31, 36; JA at 136-37.

A. PFZ Has Identified And Articulated A Substantive Due Process Right Which Is Applicable To Its Claims

The opposition briefs argue that PFZ has not been deprived of a protected property right under the substantive component of the Due Process Clause, notwithstanding PFZ's specific identification of such a protected right. The substantive due process right on which PFZ relies has been recognized and relied upon in numerous decisions of this Court and the lower courts, including the seminal land use decision, *Village of Euclid, Ohio v. Amber Realty Co.*, 272 U.S. 365 (1926).¹⁶ *Euclid* involved a property owner's challenge to a zoning ordinance which was alleged to have imposed unreasonable restrictions on the use of his land. *Id.* at 386. The Court recognized that the allegations presented the issue of whether the ordinance violated the constitutional protection provided to the right of property in the landowner.

¹⁶As discussed in Petitioner's Brief at 14-21, this right has been recognized and relied upon in numerous additional Supreme Court and circuit court decisions. See, e.g., *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264 (1977) (recognizing developer's right to be free of arbitrary or irrational zoning actions); *State of Washington, ex rel Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928) (due process protects the right of a landowner to devote its land to any legitimate use); *Nectow v. City of Cambridge*, 277 U.S. 183, 188-89 (1928) (Due Process Clause places substantive limits on a state's power to restrict a landowner's use of its property); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1409-10 (9th Cir. 1989) (substantive due process adequately alleged where plaintiffs claimed government interfered with right to use residential property for no legitimate reason); *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir.), cert. denied, 488 U.S. 851 (1988) (pertinent property interest implicitly assumed to be the property the plaintiff owns in substantive due process analysis of whether government action was arbitrary and capricious). See also *Polenz v. Parrott*, 883 F.2d 551, 556-57 (7th Cir. 1989) (landowner's property right in a substantive due process case often is assumed without discussion because it is the ownership interest in the land itself; the right to use one's property is "one of the bundle of rights attendant to ownership under the laws of property in all states").

Id. Although upholding the land use restriction in that case, the Court explained that it would have found the ordinance unconstitutional if it was arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare. *Id.* at 385.

The right was more explicitly articulated in *State of Washington, ex rel Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928). In that case, the Court stated that "[t]he right of [a landowner] to devote its land to any legitimate use is property within the protection of the Constitution". *Id.* at 121. The Court reached that conclusion in an action under the Due Process Clause of the Fourteenth Amendment. Moreover, the due process claims in *Roberge*, like those of PFZ, sought equitable relief to compel a state official to issue a building permit. *Id.* at 119.

Similarly, in *Nectow v. City of Cambridge*, 277 U.S. 183, 188-89 (1928), the Court found that the Due Process Clause placed substantive limits on the power of the state to interfere with the rights of a landowner by restricting the use of his property. The matter came before the Court on an appeal of a dismissal of a suit for a mandatory injunction directing the inspector of buildings to pass upon an application for a permit for the erection of buildings. *Id.* at 186. Relying upon *Euclid*, the Court found a substantive due process violation had occurred because the state action had no substantial relation to the public, health, morals, safety or welfare. *Id.* at 188. Although *Euclid*, *Nectow* and *Roberge* identify and address

the protected right asserted by PFZ and were discussed extensively in Petitioner's Brief, *Euclid* is mentioned only in passing and neither *Nectow* or *Roberge* is mentioned in Respondents' Brief.¹⁷

The Due Process Clause operates along a "rational continuum" which proscribes "substantial arbitrary impositions and purposeless restraints." *Moore v. City of East Cleveland, Ohio*, 431 U.S. at 502 (plurality opinion). The decisions cited by PFZ place the right of a landowner to use his property within the boundaries of that due process continuum. As Respondents note, fundamental rights under the Constitution also fall within that continuum, Respondents' Brief at 28-29, although at a different point. Thus, while PFZ is not asserting that its protected right is fundamental,¹⁸ it does maintain that its right to pursue the legitimate use of its

¹⁷ One of the amici suggests in a footnote that these decisions are no longer applicable in the substantive due process context in light of unspecified "more recent" cases. Amicus Brief of the Council of State Governments at 18 n.17. Notwithstanding that assertion, the decisions have not been criticized or limited by this Court, particularly insofar as they stand for the proposition that the right to devote one's land to a legitimate use falls within the protection of the Constitution. *Roberge* has been relied upon by this Court in the due process context, see, e.g., *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 677-78 (1976), and has been cited recently by the Ninth Circuit for the proposition advanced by PFZ regarding protected property rights. See *Harris v. County of Riverside*, 904 F.2d 497, 503 (9th Cir. 1990). The continued precedential value of *Nectow* in the due process context similarly has been reaffirmed. See, e.g., *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 499 n.6 (1977); *Polenz v. Parrott*, 883 F.2d at 556; *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d at 1407-08; *Bateson v. Geisse*, 857 F.2d 1300, 1305 (9th Cir. 1988).

¹⁸ PFZ discussed fundamental rights in Petitioner's Brief in light of the First Circuit's apparent view that a party must allege a violation of a fundamental right to prevail in a substantive due process permit challenge. See Petitioner's Brief at 13-14 & n.17.

property free from conduct which has no rational basis should enjoy the protection of the Due Process Clause.¹⁹

Respondents also argue that PFZ's assertion of a protected right to the use of its land is somehow analogous to interests in governmental benefits or continued governmental employment which have been advanced as "property rights" in the procedural due process context. See Respondents' Brief at 18-19.²⁰ However, as this Court has more recently observed, the "right to build on one's own property — even though its exercise can be subjected to legitimate permitting requirements — cannot remotely be described as a 'governmental benefit.'" *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987) (emphasis added). Respondents simply fail to recognize that the right to make use of one's land, which is recognized by every state, is one of the most basic sticks in the bundle of property rights. See *Polenz v. Parrott*, 883 F.2d at 556.²¹

¹⁹ PFZ also does not assert that the right to pursue a legitimate use of its land is a liberty interest. It simply notes that, in addressing the historic importance of property, the Supreme Court has acknowledged that, as a practical matter, liberty interests may have little meaning if one ignores the fundamental interdependence which exists between personal interest in liberty and personal interest in property. See *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

²⁰ As noted in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), the Court has made clear that the property interests alleged in those decisions have been asserted in a context which extends "well beyond actual ownership of real estate." *Id.* at 572.

²¹ Local governments only began enacting restrictions and requirements with respect to land use at the beginning of this century under the police power. See discussion in *Village of Euclid, Ohio v. Amber Realty Co.*, 272 U.S. at 386-87. However, the government's exercise of the police power in applying such restrictions is limited by the Due Process Clause. *Id.* The land uses recognized by Puerto Rico are those common to all local and state jurisdictions, see generally 23 L.P.R.A. §§ 62c, 62m, 62o, and include recreational, residential and commercial development. *Id.*

B. The Availability Of State Remedies Is Irrelevant To PFZ's Substantive Due Process Claim

Respondents also appear to argue that the Petitioner's substantive due process claim may be precluded by the availability of state remedies. Respondents' Brief at 24. This view contradicts well-established law reaffirmed recently in *Zinerman v. Burch*, 494 U.S. 113, 110 S. Ct. 975 (1990), in which this Court stated that a party may bring a Section 1983 action for deprivation of substantive due process rights regardless of the availability of state post-deprivation remedies.²² *Id.* at 125, citing generally *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled in part not relevant here*, *Monell v. Department of Social Services*, 436 U.S. 658, 664-89 (1978). See also *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 957 (9th Cir. 1991) (citing *Zinerman* for the proposition that the availability of state remedies is irrelevant in the substantive due process context).

Respondents' arguments, and those of the amici, confuse the appropriateness of considering post-deprivation state remedies in certain procedural due process contexts with the irrelevance of such consideration in the substantive due process context. The distinction between the two is explained in *Zinerman*, 494 U.S. at 132-37, and is discussed in Petitioner's Brief at 26 n.36.

C. PFZ's Substantive Due Process Claim Is Not A Takings Claim And Does Not Present A Ripeness Issue

Respondents argue that PFZ's claims must be recast as takings claims and that those recast claims must be dismissed on ripeness grounds. Respondents' Brief at 35-36. This argument misconstrues both the nature of the conduct complained of by PFZ in its Amended Complaint and the prior

²² Respondents appear to rely on two Seventh Circuit cases for their argument concerning the relevance of state remedies. Respondents' Brief at 24. Both decisions predate *Zinerman*.

decisions of this Court regarding the purpose and nature of the Takings Clause.

PFZ's substantive due process claim is distinct from a takings claim. The Amended Complaint is premised on allegations of misconduct by state officials. Moreover, as to the Commonwealth of Puerto Rico, PFZ seeks *only equitable relief*, i.e., to compel the review of the drawings which ARPE improperly has refused to process so that PFZ may pursue its approved use.²³ As this Court explained in *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987), a basic understanding of the Takings Clause "makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of *otherwise proper interference* amounting to a taking". *Id.* at 315 (latter emphasis added). PFZ's substantive due process claim is premised on misconduct which cannot reasonably be construed to allege "proper government interference" with its property. Moreover, because it seeks

²³ Amended Complaint ¶ 41(c); JA at 139. As provided by 42 U.S.C. § 1983, PFZ seeks damages from Respondent Rodriguez in his *individual* capacity for his tortious conduct involved in the refusal to process the drawings. The Takings Clause, on its face, only has application when a party seeks compensation from the *state*, not damages from an *individual*.

equitable relief, not compensation, to remedy the misconduct, PFZ's claim cannot be characterized as a "taking" within the meaning of the Fifth Amendment.²⁴

The takings ripeness analysis urged by opponents is inapposite in the substantive due process context. As this Court noted in *Zinerman v. Burch*, 494 U.S. at 125, 110 S. Ct. at 983, substantive due process violations actionable under Section 1983 are "complete when the wrongful action is taken." PFZ alleges actionable misconduct on the part of ARPE officials and seeks equitable relief under the Due Process Clause, which is not available under the Takings Clause. Moreover, Respondents' arguments ignore the fact that ARPE's refusal to process the Construction Drawings and dismissal of its project was a final decision. Reconsideration of the dismissal was denied by ARPE,²⁵ and the Puerto Rico courts declined to exercise their discretionary powers to review ARPE's decision.

Respondents suggest that PFZ could have gone to *another* agency, the Planning Board, and begun its development efforts anew, seeking the same land use approval by which it

²⁴ Respondents' suggestion would appear to raise public policy concerns which contradict certain of their other arguments. As they note, the Eleventh Amendment forecloses damage claims against the states. As such, in a proceeding against a state on a substantive due process claim, parties generally are limited to equitable relief. Equitable relief, such as that sought by PFZ, has far less impact on states than Section 1983 actions which seek "just compensation" under the Takings Clause. Moreover, given that substantive due process claims in this context will only be actionable where the deprivation of land use has no rational relationship to a legitimate objective, the resort to injunctive relief in well-founded cases will serve to promote productive uses of property rather than to deplete state treasuries.

²⁵ The request for reconsideration unequivocally advised ARPE that it had reviewed the wrong drawings. See n.11, *supra*. Nonetheless, Respondents reviewed the same drawings and denied reconsideration on that basis. See JA at 140-43.

acquired vested rights sixteen years ago.²⁶ Such action, however, would not address the conduct complained of. PFZ has never claimed that the Planning Board's action was inappropriate. Indeed, the essence of PFZ's case is its attempt to pursue the use approved by the Board in 1976. No matter how many approvals PFZ obtains from the Planning Board, those approvals will not provide the equitable relief necessary to compel ARPE to process PFZ's Construction Drawings as long as ARPE refuses to do so. PFZ already has submitted to the Respondents the Construction Drawings required to obtain a construction permit,²⁷ and Respondents have deliberately and knowingly refused to review those drawings. The Due Process Clause should be available to address their alleged arbitrary and irrational conduct through equitable relief.²⁸ The substantive due process claim alleged by PFZ was

²⁶ See n.5, *supra* (ARPE must guarantee protection of vested rights acquired by project proponents who obtain Planning Board approval).

²⁷ Respondents and the amici suggest at several junctures that PFZ did not submit construction drawings in a timely fashion. This is inconsistent with the Amended Complaint, and the facts and reasonable inferences drawn therefrom by the district court. See n.8 and accompanying text, *supra*. Moreover, it is a circular argument, inasmuch as it relies upon the very misconduct complained of. By deliberately reviewing the wrong drawings, ARPE "concluded" that no construction drawings had been submitted and that the deadline had been "missed" six years previously.

²⁸ Any argument that the action of ARPE was not "final" is contradicted by the availability of resort to the local courts, albeit for discretionary review. Respondents' suggestion that ARPE's dismissal is not final and thus not actionable is not only mistaken, but would provide ARPE every incentive to send PFZ back to the Planning Board repeatedly by simply refusing to review its drawings and dismissing its project. While arguing that ARPE's final decision does not present a ripe claim, Respondents and the amici conveniently refrain from specifying how many times ARPE must refuse to process PFZ's drawings before its decision ripens into an actionable claim. Furthermore, even if ripeness was an issue, the law should not require PFZ to do that which is repetitive or futile.

complete when its project was dismissed. See *Zinerman v. Burch*, 494 U.S. at 125, 110 S. Ct. at 983.²⁹

D. Recognition Of PFZ's Right To Use Its Land Free Of Irrational Government Conduct Does Not Trench Upon State Prerogatives Or Place An Undue Burden On The Courts

Finally, Petitioner's claim does not, as the opposition suggests, "threaten[] to transform into federal constitutional cases an entire genre of administrative land use disputes."

²⁹ While the Respondents fail to cite any authority for their argument, the amici suggest that *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), stands for the proposition that PFZ's claims are not ripe. Reliance on *Williamson County* is misplaced. Its holding with respect to ripeness applies to regulatory takings, see *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986), which are not at issue in this case. Moreover, in *Williamson County*, the Court specifically noted that substantive due process claims were not before it. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. at 182 n.4. Instead, it was presented with a regulatory takings claim premised on a challenged zoning ordinance under which a variance was available. The Court simply concluded that there was not a regulatory taking until the variance was denied. *Williamson County* is thus inapposite to the present case, which seeks equitable relief for individual acts of misconduct and has no quarrel with any regulation or zoning ordinance. PFZ has no dispute with the Planning Board's approval of its land use or with ARPE's approval of its development plan.

It should be noted that the plaintiffs in *Williamson County* also advanced a due process theory that the regulation went so far "that it had the same effect as a taking by eminent domain." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. at 197 (emphasis added). Noting that this issue was not before it, the Court suggested that, in such circumstances, the potential availability of a variance might affect ripeness; i.e., if a variance were granted, no taking would have occurred. *Id.* at 199-200. In contrast, PFZ has not alleged that ARPE's actions amount to a taking by eminent domain, it has not challenged any zoning ordinance, and there is no "zoning variance" which would somehow provide an avenue for PFZ to obtain its permit. Thus, the dicta in *Williamson County* also has no bearing on PFZ's substantive due process claims.

Amicus Brief of the Council of State Governments at 21-22. Most challenges to alleged arbitrary action by administrative permitting agencies are based on claims that the agency has exceeded its authority or given undue weight to a particular concern — health, safety or the general welfare — in the permitting process. Such matters are the daily grist of the land use administrative mill and do not, in most instances, raise constitutional issues because, even if wrong, they are rationally related to proper governmental concerns.

Here, however, the facts pose quite a different matter. Petitioner has demonstrated that its proposed use was legitimate, based on Planning Board approval. It has alleged that Respondents deliberately reviewed an incorrect set of drawings to serve as the basis of ARPE's decision to dismiss PFZ's project. Such an action, which is unrelated to any legitimate governmental interest, cannot be a rational basis for the government to deny an owner the legitimate use of his land.

There is no evidence that correcting an occasional abuse would "make the Fourteenth Amendment a font of tort law." *Parratt v. Taylor*, 451 U.S. 527, 544 (1981). It hardly trivializes the Constitution to suggest that permitting authorities must base their decisions on grounds rationally related to a legitimate governmental purpose. Indeed, it is noteworthy that, although the right which Petitioner asserts has been recognized by this Court since as early as 1928, there has been no flood of petitions to the federal courts. See Petitioner's Brief at 21-23. This history suggests that most permitting bodies act rationally and from legitimate government concerns. A decision by this Court to allow Petitioner to correct a clear alleged abuse will not trench upon state prerogatives.

CONCLUSION

The First Circuit's failure to recognize a substantive due process violation with respect to PFZ's protected right to pursue a legitimate use of its property, notwithstanding

facially sufficient allegations of arbitrary, capricious and illegal conduct, is inconsistent with the teachings of this Court and the majority of the other federal circuits. The Court should reverse the decision below, and remand this case for proceedings consistent with its decision.

Respectfully submitted,

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In The
Supreme Court of the United States
October Term, 1991

—◆—
PFZ PROPERTIES, INC.,

Petitioner,

v.

RODRIGUEZ, et al.,

Respondents.

—◆—
On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit
—◆—

BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION
IN SUPPORT OF PETITIONER
PFZ PROPERTIES, INC.
—◆—

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES CITED.....	ii
INTEREST OF AMICUS	2
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENT.....	4
ARGUMENT	5
I. GOVERNMENT ACCORDS SUBSTANTIVE DUE PROCESS WHEN ITS ACTS ARE RATIONALLY RELATED TO A PERMISSIBLE STATE OBJECTIVE	5
II. THE DECISION BELOW INVITES DELIBERATE GOVERNMENT LAWBREAKING.....	7
III. DELIBERATE GOVERNMENT LAWBREAKING IS INTOLERABLE IN A SOCIETY GOVERNED BY LAW	9
IV. THE FIRST CIRCUIT'S UNIQUE TEST IS UNNECESSARY BECAUSE EXISTING RULES ADEQUATELY SCREEN OUT CASES INVOLV- ING PETTY PROCEDURAL MISTAKES	10
CONCLUSION	14

TABLE OF AUTHORITIES CITED

	Page
CASES	
Amsden v. Moran, 904 F.2d 748 (1st Cir. 1990)	8
Chiplin Enterprises, Inc. v. City of Lebanon, 712 F.2d 1524 (1st Cir. 1983)	8
City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976)	6
Creative Environments, Inc. v. Estabrook, 680 F.2d 822 (1st Cir. 1982)	5, 10-13
Daniels v. Williams, 474 U.S. 327 (1986)	6, 10, 13
Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978)	6
Flast v. Cohen, 392 U.S. 83 (1968)	13
Hodel v. Indiana, 452 U.S. 314 (1981)	6
In re Gault, 387 U.S. 1 (1967)	9
International Shoe Co. v. Washington, 326 U.S. 310 (1945)	9
Lassiter v. Department of Social Services, 452 U.S. 18 (1981)	9
Moore v. City of East Cleveland, 431 U.S. 494 (1977)	6
Nectow v. City of Cambridge, 277 U.S. 185 (1928)	6
Nollan v. California Coastal Commission, 483 U.S. 825 (1987)	2
Paul v. Davis, 424 U.S. 693 (1976)	13
Pennell v. City of San Jose, 485 U.S. 1 (1988)	2, 6

TABLE OF AUTHORITIES CITED - Continued

	Page
Pittsley v. Warish, 927 F.2d 3 (1st Cir. 1991)	12
Rochin v. California, 342 U.S. 165 (1952)	12
Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819)	9
Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)	6
Williamson County Regional Planning Commis- sion v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)	12

STATUTES

42 U.S.C. § 1983	3
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RULES

Supreme Court Rule 37	1
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No. 91-122

In The
Supreme Court of the United States
October Term, 1991

PFZ PROPERTIES, INC.,

Petitioner,

v.

RODRIGUEZ, et al.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

**BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION
IN SUPPORT OF PETITIONER
PFZ PROPERTIES, INC.**

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of petitioner PFZ Properties, Inc. Written consent to the filing of this brief has been granted by counsel for all parties. The consent letters have been lodged with the Clerk of this Court.

INTEREST OF AMICUS

Pacific Legal Foundation (PLF) is a California non-profit corporation organized for the purpose of engaging in litigation that affects the public interest. Policy is set by an independent Board of Trustees composed of concerned citizens, the majority of whom are attorneys.

PLF has participated in many cases involving land use and the Due Process Clause. Its attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Pennell v. City of San Jose*, 485 U.S. 1 (1988). PLF's public policy perspective and litigation experience in support of private property rights will provide a helpful additional viewpoint on the constitutional issues in the case at bar.

STATEMENT OF THE CASE

The facts recited by the Commonwealth of Puerto Rico are quite different from those alleged in the complaint filed by PFZ Properties, Inc. (PFZ). Since this case is on appeal from a dismissal of PFZ's complaint, its version of the facts must be accepted.

In 1976 the Planning Board of Puerto Rico gave preliminary approval for site-specific use designations and the subdividing of land PFZ owns in Vacía Talega. Petition for certiorari at 3. An environmental lawsuit by neighboring residents temporarily delayed PFZ from obtaining final approval of its plans. PFZ successfully concluded the suit in 1978 and promptly submitted final plans for Phase 1 of its project to the Regulations and

Permits Authority (ARPE). It took ARPE three years to review the plans. Finally, in 1981, ARPE gave final discretionary approval of a scaled-down version of the plans. *Id.* at 4.

In 1982 PFZ submitted construction drawings to ARPE for Phase 1. ARPE had a ministerial duty at that point to review the drawings for technical compliance with the building code and to issue building permits. *Id.* After four years, PFZ inquired by letter about the status of its construction drawings. ARPE did not answer. Two years later, the president of PFZ learned from a special advisor to the governor why its permit had not yet been issued. The governor had determined years earlier for personal and political reasons that PFZ's project should not go forward. *Id.* at 5. For this reason the administrator of ARPE, a political appointee of the governor, had instructed his staff to neither process PFZ's drawings, nor communicate with PFZ. *Id.* at 4.

PFZ filed this action in federal court for damages under 42 U.S.C. § 1983 alleging that ARPE's refusal to process the drawings was a violation of PFZ's right to due process. Defendants filed an answer and a motion to dismiss and sent PFZ a letter stating that the 1976 Planning Board approval and the 1981 ARPE approval had expired and PFZ would not receive its permits. PFZ appealed ARPE's decision both administratively and in the commonwealth courts without success prior to further pursuing its federal action. *Id.* at 6.

When PFZ returned to federal court, however, the District Court dismissed PFZ's complaint. The First Circuit affirmed the dismissal, ruling that PFZ had stated a

claim for neither procedural nor substantive due process. In ruling on PFZ's substantive due process claim, the First Circuit relied on a test which is inconsistent with this Court's formulations for substantive due process violations. This unique test is contrary to sound public policy and has the effect of turning away a potentially valid claim, thus denying PFZ its day in court.

SUMMARY OF ARGUMENT

The First Circuit's theory of what constitutes a violation of substantive due process and this Court's pronouncements on that subject are irreconcilable. The First Circuit operates from a presumption that even bad faith, illegal denials of building permits "do not ordinarily implicate substantive due process." *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31 (1st Cir. 1991). This Court, however, makes no distinction between deprivations of land use entitlements and other sorts of entitlements. Moreover, this Court has never said that deliberate law-breaking by government officials for the purpose of depriving an individual of his property rights is an insufficient ground for a due process claim. On the contrary, this Court has found the Due Process Clause offended where government action is arbitrary or not rationally related to a permissible state objective. The First Circuit's addition of a requirement that government action also be " 'for purposes of oppression,' or [an] 'abuse of government power that shocks the conscience' " (*id.* at 31) simply invites government officials to deliberately break the law.

Deliberate government lawbreaking is intolerable in a society governed by law. In fact, early understandings of the due process guaranty show that its very purpose was to force the government to obey the law.

The First Circuit's additional test springs from a fear that "[v]irtually every alleged . . . error of a local planning authority . . . could be brought to a federal court." *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 831 (1st Cir. 1982). The First Circuit's fear is unfounded and its added test is unnecessary because this Court's existing rules regarding the pleading of constitutional claims in general and, in particular, due process claims involving development proposals, adequately screen out cases involving trivial mistakes in the processing of land use applications. These rules include this Court's requirement that such a case be "ripe," the requirement of scienter in due process cases, and the rule against rendering advisory opinions.

ARGUMENT

I

GOVERNMENT ACCORDS SUBSTANTIVE DUE PROCESS WHEN ITS ACTS ARE RATIONALLY RELATED TO A PERMISSIBLE STATE OBJECTIVE

As distinguished from its procedural cousin, substantive due process focuses on what the government has done, as opposed to how and when the government did it. To satisfy procedural due process, generally speaking,

the government must not deprive a person of an entitlement without some sort of notice and a chance to be heard. To satisfy substantive due process, on the other hand, the government must have a legitimate reason for taking away the entitlement, regardless of what procedures it provides to accomplish the deprivation. *Daniels v. Williams*, 474 U.S. 327, 331 (1986). A legitimate reason is one that is not arbitrary or capricious, but is rationally related to accomplishing a permissible state objective. *Moore v. City of East Cleveland*, 431 U.S. 494, 498 (1977).

Although the court below opined that "refusals to issue building permits do not ordinarily implicate substantive due process" (928 F.2d at 31), this Court has not distinguished the deprivation of land use entitlements from other sorts of entitlements. See, e.g., *Pennell v. City of San Jose*, 485 U.S. at 11 (ordinance regulating what rent a property owner can charge); *Hodel v. Indiana*, 452 U.S. 314, 331 (1981) (act regulating the use of land for surface mining); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125 (1978) (statute requiring oil refiners to discontinue operating retail stations on land developed for that use); *Moore v. City of East Cleveland*, 431 U.S. at 498 (ordinance regulating the occupancy of single dwelling units); *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 676 (1976) (zoning ordinance); *Nectow v. City of Cambridge*, 277 U.S. 185, 187-88 (1928) (zoning ordinance); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (zoning ordinance).

In all these cases this Court analyzed the substantive due process requirement in terms of whether the government had acted to deprive a property owner of a property right for arbitrary reasons or for reasons that were not

rationally related to a permissible state objective. Amicus is aware of no instance where this Court has elevated the plaintiff's burden in a due process case to something beyond this familiar test.

II

THE DECISION BELOW INVITES DELIBERATE GOVERNMENT LAWBREAKING

The First Circuit assumed that ARPE "arbitrarily or capriciously refused to process [PFZ's] approved construction drawings." *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d at 31. The court also assumed that in so doing ARPE "violated state law" and "failed to comply with agency regulations or practices." *Id.* at 32. The court further assumed that ARPE "engaged in delaying tactics and refused to issue permits . . . based on considerations outside the scope of its jurisdiction." *Id.* The court even assumed that these unlawful acts "injured [PFZ's] property." *Id.* at 31.

Despite having accepted as true PFZ's allegations that ARPE was guilty of intentionally breaking the law and singling PFZ out for different treatment based on improper motives, thus injuring its property, the Court of Appeals nonetheless affirmed the dismissal of PFZ's substantive due process claim. As support for its action, the Court of Appeals made this astonishing statement:

"Even where state officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation. . . . The doctrine of substantive due process 'does not protect

individuals from all governmental actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents "governmental power from being used for purposes of oppression," or "abuse of government power that shocks the conscience," or "action that is legally irrational." " *Id.* (citations omitted).

The court goes on to define "legally irrational" in such a way that governmental lawbreaking, if done in pursuit of an otherwise legitimate state interest, is not legally irrational. *Id.* at 31-32.

Further on, the court remarks that " 'even bad faith violations of state law are not necessarily tantamount to unconstitutional deprivations of due process.' " *Id.* (quoting *Amsden v. Moran*, 904 F.2d 748, 757 (1st Cir. 1990)). The court reiterates this view at another point with even greater conviction: " 'A mere bad faith refusal to follow state law . . . simply does not amount to a deprivation of due process.' " *Id.* at 32 (quoting *Chiplin Enterprises, Inc. v. City of Lebanon*, 712 F.2d 1524, 1528 (1st Cir. 1983)). In the case quoted, *Chiplin Enterprises*, the owner's application was processed, his permit was issued, and a state court remedy was available to correct the city's procedural error. By contrast, PFZ's application was not processed, its permit was denied, and the commonwealth courts denied PFZ a remedy. Thus, in PFZ's case, the federal court has abdicated its role as a last line of defense between the American citizen and political corruption.

If the First Circuit's view prevails, politicians will readily conclude that the laws they pass are applicable only to the taxpayers, not to themselves. Bureaucrats will

know that the regulations they promulgate are applicable only to the property owners, not to themselves. The disincentive against "bad faith violations of state law" by government when dealing with its citizenry will be gone.

III

DELIBERATE GOVERNMENT LAWBREAKING IS INTOLERABLE IN A SOCIETY GOVERNED BY LAW

In attempting to define the guaranty of due process, this Court has described it as a "requirement of 'fundamental fairness' " (*Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981)), or "fair play" (*International Shoe Co. v. Washington*, 326 U.S. 310 (1945)). It has also been described as a social contract under which the rights of individuals and the limits of the power of government are defined. *In re Gault*, 387 U.S. 1, 20 (1967).

Whatever else may be the source of the terms of that social contract, courts must at least be able to look to the laws of the state. The concept of due process had its origins in the Magna Carta as a protection to individuals against arbitrary departures by the Crown from the "law of the land." Daniel Webster, in his well-known definition of the phrase in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), said: "The meaning is, that every citizen shall hold life, liberty, property, and immunities under the protection of the general rules which govern society." *Id.* at 581. Due process, then, at the very least requires those holding public office to administer the law impartially and not deliberately violate the law

themselves. *Daniels v. Williams*, 474 U.S. at 331 (“[h]istorically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property” (emphasis in original)).

In the case at bar, PFZ has alleged that politically motivated governmental officials deliberately refused to follow the law regarding the timely processing of land use applications and the ministerial granting of permits. It is alleged that PFZ was singled out for this treatment because these officials wanted to deprive PFZ of a property right he obtained years earlier.

Whether looking back to Daniel Webster’s formulation of due process as impartial protection under the general laws that govern society, or to *International Shoe’s* notion of fair play, or to the modern terminology requiring that government acts be in furtherance of permissible purposes, PFZ has adequately pled the violation of its right to due process.

IV

THE FIRST CIRCUIT’S UNIQUE TEST IS UNNECESSARY BECAUSE EXISTING RULES ADEQUATELY SCREEN OUT CASES INVOLVING PETTY PROCEDURAL MISTAKES

The First Circuit’s “shock the conscience” test for due process claims appears to originate in *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822. In that case a town planning board denied a developer’s subdivision plan. The developer and the board had disagreements over the

adequacy of an environmental document and a town ordinance regarding the configuration of lot lines. In the court’s words, the disagreements were “typical of the run of the mill dispute between a developer and a town planning agency.” *Id.* at 833. The developer brought suit in federal court under the Civil Rights Act asserting, among other things, that the board was interpreting its laws too liberally, causing a violation of the developer’s right to due process. *Id.* at 831.

The Court of Appeals expressed concern that if it heard the case, “[v]irtually every alleged legal or procedural error of a local planning authority . . . could be brought to a federal court on the theory that the erroneous application of state law amounted to a taking of property without due process.” *Id.* After all, the court noted: “Every appeal by a disappointed developer . . . necessarily involves some claim that the board exceeded [or] abused . . . its legal authority in some manner.” *Id.* at 833 (emphasis in original). Based on this concern, the court affirmed the grant of summary judgment against the developer. To drive its point home, the court stated in a footnote, “even if it could here be shown that the Board members strayed wilfully from ‘the proper ends of their governmental duties,’ their digression was not of ‘constitutional proportions.’ ” *Id.* at 832 n.9.

This idea that a little official lawbreaking is acceptable, so long as it does not reach “constitutional proportions,” was picked up in later First Circuit cases as a requirement that the illegal acts of governmental officials

must shock the court's conscience or the plaintiff's case will be thrown out of court.¹

The court's concern in *Creative Environments* reflects some legitimate considerations. The Civil Rights Act and the federal courts were not meant to be a fountain of tort damages for every petty mistake made in the processing of development proposals. But existing pronouncements of this Court are adequate to screen out such cases; it was unnecessary for the First Circuit to erect another, unsportingly high, hurdle.

For example, this Court already requires cases involving development proposals to reach a state of "ripeness" before filing in federal court. *Williamsōn County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 185 (1985) ("whether we examine the Planning Commission's application of its regulations under Fifth Amendment 'taking' jurisprudence, or under the precept of due process, we conclude that respondent's claim is premature"). Ripeness requires a final decision by the agency as to how it will apply its regulations to the subject property. While PFZ's case is ripe, it is questionable whether the *Creative Environments* case was.

¹ *Pittsley v. Warish*, 927 F.2d 3, 6-7 (1st Cir. 1991), purports to derive the shock the conscience test from this Court's decision in *Rochin v. California*, 342 U.S. 165, 169 (1952). In *Rochin*, the conduct of police officers who pumped a man's stomach against his will was said to shock the conscience. The Court did not, however, hold that the Due Process Clause was relegated solely to situations which shock the conscience. Indeed the Court repeatedly emphasized that the test is a far more general one. See, e.g., *id.* at 169, 173.

This Court also requires scienter before a due process claim can be stated. It is not enough for a governmental official to accidentally or unknowingly overstep his legal boundaries, he must do it with an intent to break the law and deprive the plaintiff of some liberty or property right. *Daniels v. Williams*, 474 U.S. at 330-32; *Paul v. Davis*, 424 U.S. 693, 700-01 (1976). Many cases involving trivial mistakes in the processing of development proposals will not pass this filter.

Yet another rule of this Court which will turn away many typical permit denials, and which should have prevented *Creative Environments* from getting as far as it did, is the rule that federal courts will not issue advisory opinions. *Flast v. Cohen*, 392 U.S. 83, 95 (1968). In *Creative Environments*, the developer's due process claim was aimed at only two alleged reasons for denying the subdivision plan. The developer did not dispute, however, that "at least several" other valid, independent reasons were given by the board for denying its proposal. 680 F.2d at 830-31. Since a decision in the developer's favor therefore would not have required reversal of the board's action, the "federal question" which allegedly invoked federal court jurisdiction was nothing more than a disallowed request for an advisory opinion.

Where a case does clear all these hurdles, it is probably no longer a "run of the mill dispute between a developer and a town planning agency" (*id.* at 833) which should be steered toward the state courts.

The case at bar is no run of the mill case. Having cleared this Court's hurdles, and having stated a valid due process claim, PFZ deserves to have its day in court.

Instead, PFZ was turned away because of the First Circuit's extra test requiring some subjective shock to the conscience of the judge the parties happen to draw. This extra test is unfair and unnecessary and should be expressly overruled along with the reversal of the decision below.

CONCLUSION

It was error for the court below to dismiss PFZ's complaint. The facts alleged regarding the actions of ARPE officials and the inaction of the commonwealth courts state a valid claim under the decisions of this Court that PFZ's right to due process of law was violated. PFZ should have the opportunity to prove its allegations and its damages. The First Circuit's shock the conscience test should be overruled and the decision below reversed.

DATED: December, 1991.

Respectfully submitted,

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BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS
CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENT.....	3
ARGUMENT	5
I. A CORE PURPOSE OF THE FOURTEENTH AMENDMENT IS TO PROTECT PRIVATE PROPERTY RIGHTS AGAINST ARBITRARY AND OPPRESSIVE ACTIONS OF STATE OFFI- CIALS	5
II. A PATTERN OF DECEPTION, DELAY, AND POLITICALLY MOTIVATED MANIPULATION OF THE BUILDING PERMIT PROCESS STATES A CLAIM UNDER THE FOURTEENTH AMENDMENT AND 42 U.S.C. § 1983	9
A. The Dichotomy Between Property Rights and Other Rights is a False One	9
B. The Facts As Alleged State a Substantive Due Process Cause of Action	12
C. The Substantive Due Process Claim Alleged Here is Complementary to, But Not Duplica- tive of, a Takings Claim Under the Fifth Amendment.....	15
CONCLUSION	18

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Aladdin's Castle, Inc. v. City of Mesquite</i> , 630 F.2d 1029 (5th Cir. 1980), <i>rev'd in part and remanded</i> , 455 U.S. 283 (1982), <i>opinion extended</i> , 713 F.2d 137 (5th Cir. 1983).....	8
<i>Amsden v. Moran</i> , 904 F.2d 748 (1st Cir. 1990), <i>cert. denied</i> , 111 S.Ct. 713 (1991)	15
<i>Bateson v. Geisse</i> , 857 F.2d 1300 (9th Cir. 1988)	14, 15, 16, 17
<i>Bello v. Walker</i> , 840 F.2d 1124 (3rd Cir.), <i>cert. denied</i> , 488 U.S. 851 (1988)	13, 14
<i>Brady v. Town of Colchester</i> , 863 F.2d 205 (2nd Cir. 1988).....	13
<i>Corfield v. Coryell</i> , 6 F. Cas. 546 (C.C.E.D. Pa. 1823)	6
<i>Daniels v. Williams</i> , 474 U.S. 327 (1986)	12, 13
<i>Davidson v. Cannon</i> , 474 U.S. 344 (1986)	13, 16
<i>First English Evangelical Lutheran Church of Glendale v. County of Los Angeles</i> , 482 U.S. 304 (1987)	16
<i>Hawaii Housing Authority v. Midkiff</i> , 467 U.S. 229 (1984)	17
<i>Littlefield v. City of Afton</i> , 785 F.2d 596 (8th Cir. 1986).....	14
<i>Lochner v. New York</i> , 198 U.S. 45 (1905).....	8
<i>Moore v. City of East Cleveland</i> , 431 U.S. 494 (1977)	11
<i>Nebbia v. New York</i> , 291 U.S. 502 (1934).....	13
<i>New Burnham Prairie Homes, Inc v. Village of Burnham</i> , 910 F.2d 1474 (7th Cir. 1990).....	10

TABLE OF AUTHORITIES - Continued

Page(s)

<i>PFZ Properties, Inc. v. Rodriguez</i> , 928 F.2d 28 (1st Cir. 1991)	9, 10
<i>Poe v. Ullman</i> , 367 U.S. 497 (1961).....	11
<i>Sinaloa Lake Owners Ass'n v. City of Simi Valley</i> , 882 F.2d 1398 (9th Cir. 1989), <i>cert. denied sub nom. Doody v. Sinaloa Lake Owners Ass'n</i> , 110 S.Ct. 1317 (1990).....	11, 15, 17
<i>Slaughter-House Cases</i> , 83 U.S. 36 (1873)	7
<i>United States v. General Motors</i> , 323 U.S. 373 (1945)	11
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356 (1886).....	7, 8, 17
<i>Youngberg v. Romeo</i> , 457 U.S. 307 (1982)	13

CONSTITUTIONS

U.S. Constitution, Amendment XIV	<i>passim</i>
--	---------------

STATUTES

42 U.S.C. § 1983.....	2, 4, 13, 15
Civil Rights Act of 1866	6
P.R. Laws Ann., tit. 23, § 71c	8

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C. Bolick, <i>Unfinished Business: A Civil Rights Strategy for America's Third Century</i> (1990)	7
<i>Civil Rights and the American Negro</i> (A. Blaustein and R. Zangrando, eds. 1968).....	5

TABLE OF AUTHORITIES – Continued

	Page(s)
M. Curtis, <i>No State Shall Abridge</i> (1986)	7
R. Higgs, <i>Competition and Coercion</i> (1977)	5
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Siegan, "Economic Liberties and the Constitution: Protection at the State Level," in <i>Economic Liber- ties and the Constitution</i> (J. Dorn and H. Manne, eds. 1987)	6

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**BRIEF OF THE INSTITUTE FOR JUSTICE
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

INTEREST OF AMICUS CURIAE

The Institute for Justice is a public interest law center committed to strengthening three constitutional pillars of a free society: economic liberty, private property rights, and the free marketplace of ideas.

This case involves the viability of the "substantive due process" doctrine as a restraint on oppressive and arbitrary government actions that significantly impair the exercise of an individual's private property rights. The Institute for Justice represents individuals across the

nation whose liberty and property rights have been violated by abusive government actions. The outcome in this case is of direct and immediate concern to the Institute's clients and to its mission of strengthening the constitutional protections of economic liberty and private property rights. We believe our expertise in this area of law can provide the Court with context and historical perspective that may be helpful in resolving the important legal issues at stake.

STATEMENT OF THE CASE

The district court and court of appeals held that petitioner failed to state a substantive due process claim under the Fourteenth Amendment and 42 U.S.C. § 1983 for the delay and denial of building permits by the respondent government officials. Review is limited to the question "Whether an arbitrary, capricious or illegal denial of a construction permit to a developer by officials acting under color of state law can state a substantive due process claim under 42 U.S.C. § 1983."

Since this petition involves a dismissal for failure to state a cause of action, petitioner's allegations are taken as true. Petitioner alleges that respondent officials have intentionally engaged in a 15-year pattern of delay, deception, and politically motivated manipulation of the building permit process, with the ultimate consequence of denying petitioner the opportunity to develop his property.

In 1976, the Planning Board of Puerto Rico adopted a resolution approving a development project proposed by

petitioner. The proposal was forwarded to the Regulations and Permits Authority (ARPE), which performs ministerial functions and issues building permits. In February 1981, ARPE approved petitioner's development plans by formal resolution. Petitioner filed construction drawings as required in February 1982. Thereafter, the project encountered years of unexplained delay. In February 1987, the administrator of ARPE prepared a letter establishing further conditions for the proposed development, but his successor as administrator secretly locked the letter in a drawer where it remained until disclosed in discovery in this lawsuit. The reason for the delay and deception was political opposition to the proposed development.

In August 1988, after petitioner filed his initial action in this matter, ARPE finally informed petitioner it would not issue a construction permit and rescinded the prior resolutions approving the project. The reasons given for these actions were wilfully false. Review of these actions by Puerto Rico courts is discretionary, and the courts declined to exercise such discretionary review in this case. Petitioner filed the present amended complaint in October 1988. The district court granted respondent's motion to dismiss, and the court of appeals affirmed that decision.

SUMMARY OF ARGUMENT

The Fourteenth Amendment was enacted to protect individuals in their lives, liberty, and property against oppressive and arbitrary actions of state governments.

During the Reconstruction era in which the amendment was adopted, state officials enforced laws that were facially reasonable in a manner that nonetheless had the intent and effect of depriving individuals of their rights. So today do state and local officials sometimes manipulate the machinery of government in a manner offensive to the Fourteenth Amendment's core purpose.

Substantive due process protects liberty and property by ensuring that actions of state officials that have the intent and effect of diminishing liberty or property must rationally serve a legitimate government purpose even if those actions are taken in conformity with appropriate procedures. This doctrine leaves wide latitude for the state's police powers, even if exercised in mistaken or misguided fashion. Substantive due process thus protects against only the most outrageous abuses of government power; but the doctrine is nonetheless vitally important, since it provides one of the few substantive restraints on oppressive actions of state officials.

The ruling below would extinguish this protection in the context of property rights. Petitioner has alleged a pattern of pernicious and abusive actions by government officials that have prevented him from developing his property. The ruling by the court below that these allegations do not even state a cause of action under the Fourteenth Amendment and 42 U.S.C. § 1983 is a serious departure from the jurisprudence of this Court and other circuits, as well as from the Fourteenth Amendment's clear objectives. If upheld, the decision below would have the effect of singling out property rights for non-protection under substantive due process, thereby depriving

individuals of an important constitutional safeguard of their property rights.

ARGUMENT

I. A CORE PURPOSE OF THE FOURTEENTH AMENDMENT IS TO PROTECT PROPERTY RIGHTS AGAINST ARBITRARY AND OPPRESSIVE ACTIONS OF STATE OFFICIALS

The southern states did not take lightly their defeat in the Civil War. They determined that if they could not perpetuate the institution of slavery as such, they would maintain it as closely as practicable by denying to the recently freed slaves the most basic rights of free individuals.

The southern governments unleashed a torrent of laws aimed at restricting freedom of contract, private property rights, and the right to pursue trades and businesses. These measures included occupational licensing laws, vagrancy laws, and "debt peonage" laws, many of which were facially neutral but evil in intent and devastating in effect. Together, they comprised a pervasive, interlocking system of economic restraints designed to maintain a servile labor supply and inhibit true emancipation of blacks. See, e.g., G. Myrdal, *An American Dilemma* 228-229 (1944); *Civil Rights and the American Negro* 223-224 (A. Blaustein and R. Zangrando, eds., 1968); R. Higgs, *Competition and Coercion* 7 and 134 (1977); Roback, "Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?" 51 *Univ. of Chicago L. Rev.* 1161, 1163-1164 (1984).

Congress responded to these abuses by passing the Civil Rights Act of 1866, which was designed, in the words of its floor manager, Rep. James F. Wilson, to secure "the absolute rights of individuals, such as 'the right of personal security, the right of personal liberty, and the right to acquire and enjoy property.'" Blaustein and Zangrando at 224-225. The act was quite specific in guaranteeing to all citizens the right to

make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws [for] the security of persons and property. . . .

President Andrew Johnson vetoed the act on the grounds that Congress lacked authority to enact it. Though Congress overrode the veto, it moved at once to safeguard the act's provisions by "constitutionalizing" them in the Fourteenth Amendment. See Siegan, "Economic Liberties and the Constitution: Protection at the State Level," in *Economic Liberties and the Judiciary* 137-150 (J. Dorn and H. Manne, eds., 1987). The amendment's framers "viewed the trilogy of privileges and immunities, due process, and equal protection of the laws as a caption for the rights enumerated in the Civil Rights Act [of 1866]." H. Belz, *Emancipation and Equal Rights: Politics and Constitutionalism in the Civil War Era* 122 (1978). The amendment's framers repeatedly defined the substantive content of these provisions by reference to Justice Bushrod Washington's decision in *Corfield v. Coryell*, 6 F. Cas. 546, 551-552 (C.C.E.D. Pa. 1823), which included among the "fundamental" rights of citizens "the enjoyment of life and liberty, with the right to acquire and possess

property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole." See *Slaughter-House Cases*, 83 U.S. 36, 75-76; *id.* at 97-98 (Field, J., dissenting); *id.* at 114-118 (Bradley, J., dissenting).¹ Congress subsequently enacted the Civil Rights Act of 1871, creating a private cause of action, codified as 42 U.S.C. § 1983, for deprivations of these rights inflicted "under color of state law."

This Court traditionally has protected property rights and economic liberty under the due process and equal protection clauses. The facts presented in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), are paradigmatic of the abuses the Fourteenth Amendment was intended to remedy. In that case, the San Francisco city government enacted an ordinance requiring licenses, granted at the discretion of the board of supervisors, for laundry businesses except those in buildings made of brick or stone. Though the law appeared benign, it was enforced to deny licenses to Chinese entrepreneurs even though they "complied with every reasonable condition demanded by any public interest." *Id.* at 366. Concluding that the power exercised by the board of supervisors was "purely arbitrary, and acknowledges neither guidance nor restraint," the Court struck down the city's license denials as a violation of

¹ These rights were included among the "privileges or immunities" of citizenship, but this clause of the Fourteenth Amendment was eviscerated in the *Slaughter-House Cases*. This decision is the subject of extensive criticism. See, e.g., C. Bolick, *Unfinished Business: A Civil Rights Strategy for America's Third Century* 60-68 (1990); M. Curtis, *No State Shall Abridge* (1986); B. Siegan, *Economic Liberties and the Constitution* 47-54 (1980).

due process and equal protection. The nature, theory, and institutions of our government, the Court declared, "do not mean to leave room for the play and action of purely personal and arbitrary power." *Id.* at 369-370.

The Court's declaration in *Yick Wo* of what has come to be the essence of substantive due process – that oppressive government actions infringing on basic rights are contrary to our constitutional system – continues to have resonance today. Indeed, the proliferation at every level of government of unelected bureaucrats² and regulatory agencies makes the exercise of government power ever more susceptible to abuse and ever less accountable through ordinary democratic processes.

The Fifth Circuit noted with alarm this propensity in *Aladdin's Castle, Inc. v. City of Mesquite*, 630 F.2d 1029 (5th Cir. 1980), *rev'd in part and remanded*, 455 U.S. 283 (1982), *opinion extended*, 713 F.2d 137 (5th Cir. 1983). In *Aladdin's Castle*, the city government induced a company to make a major investment in a local business, only to then deny it a business license. The court invalidated the city's actions as a violation of due process and equal protection, declaring that

We certainly have no wish to challenge the legitimacy of many, even most of the statutes, ordinances and regulations issued by the innumerable legislatures and agencies in our modern and complex society. The era of *Lochner v. New York*, 198 U.S. 45 [1905], is happily long

² Respondent Rodriguez, administrator of respondent ARPE, is a political appointee who serves at the pleasure of the governor. P.R. Laws Ann., tit. 23, § 71c.

ended. Nevertheless, recognition of the multiple problems and needs of our contemporary world does not oblige us to discard the basic principles of constitutional government to which we have always been committed. . . .

It is not the courts alone who are bound to respect these freedoms. Executives and legislatures, from the nation's capital to the smallest village . . . are called upon by our Constitution to respect, enforce and cherish these principles of liberty and personal autonomy.

Id. at 1044-1046. Despite its modest sweep in curtailing only those oppressive actions that fall clearly outside a state's legitimate police powers, the doctrine of substantive due process is a vitally important safeguard protecting the lives, liberty, and property of individuals.

II. A PATTERN OF DECEPTION, DELAY, AND POLITICALLY MOTIVATED MANIPULATION OF THE BUILDING PERMIT PROCESS STATES A CLAIM UNDER THE FOURTEENTH AMENDMENT AND 42 U.S.C. § 1983

A. *The dichotomy between property rights and other rights is a false one.* The First Circuit in its decision below acknowledges that " 'substantive due process prevents "governmental power from being used for purposes of oppression," or "abuse of government power that shocks the conscience," or "action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests." ' " *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31-32 (1st Cir. 1991)(citations omitted). However, the court appears to carve out a special exception to this

protection for the exercise of certain property rights, holding as a matter of law that "refusals to issue building permits do not ordinarily implicate substantive due process." *Id.* at 31. This is true, in the First Circuit's view, "[e]ven where state officials have allegedly violated state law or administrative decisions," *id.*, and even if such violations are committed in bad faith. *Id.* at 32. This doctrine of nonprotection of property development rights allowed the court to conclude here that "[e]ven assuming [respondent] engaged in delaying tactics and refused to issue permits for the . . . project based on considerations outside the scope of its jurisdiction under Puerto Rico law, such practices, without more, do not rise to the level of violations of the federal constitution" under substantive due process. *Id.*

Although the court did not explain its rationale, the only distinguishing factor between this case and other cases in which similar abusive and oppressive actions of government officials would trigger substantive due process analysis is the species of rights involved – in this case, the right to develop one's property. Similarly, the Seventh Circuit has created a special category for nonprotection of property rights under substantive due process. *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474 (7th Cir. 1990). Stating that "the Supreme Court has yet to set the contours of any substantive due process right with respect to property interests," *id.* at 1480 n.5, the Seventh Circuit held that in order to state such a claim for the denial of a building permit, "in addition to alleging that the decision was arbitrary or irrational, 'the plaintiff must also show either a separate

constitutional violation or the inadequacy of state law remedies.' " *Id.* at 1481 (citation omitted).

The notion that property rights somehow do not rise to the level of other rights with respect to substantive due process protection has no support either in the decisions of this Court or in the clear intent of the Fourteenth Amendment. To the contrary, the preceding section illustrates that property rights were of foremost concern to the amendment's framers, who sought to protect those rights against precisely the type of arbitrary and oppressive interference at issue in this case.

Moreover, this Court has made clear that property rights are not limited to mere ownership of property, but the "right to possess, use, and dispose of it." *United States v. General Motors*, 323 U.S. 377-378 (1945). Indeed, as Justice Harlan observed, the concept of due process encompasses "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints. . . ." *Poe v. Ullman*, 367 U.S. 497, 543 (1961)(Harlan, J., dissenting)(cited with approval in *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977)(plurality)).

The Ninth Circuit has rejected the dichotomy suggested by the court below. In *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989), *cert. denied sub nom. Doody v. Sinaloa Lake Owners Ass'n*, 110 S.Ct. 1317 (1990), the Ninth Circuit applied the same substantive due process analysis it uses in police brutality cases to allegations that local government officials maliciously and unnecessarily violated private property

rights. In an opinion by Judge Alex Kozinski, the court held that

the fourteenth amendment's due process clause protects property no less than life and liberty. . . . To the extent that arbitrary or malicious use of physical force violates substantive due process, there is no principled basis for exempting the arbitrary or malicious use of other governmental powers from similar constitutional restraints.

Id. at 1408-1409. We urge the Court to adopt the Ninth Circuit's uniform approach to substantive due process analysis as the rule most consistent with the theory of rights embraced by the Fourteenth Amendment, and with the overwhelming weight of precedent as discussed below.

B. *The facts as alleged state a substantive due process cause of action.* This Court has established the contours of substantive due process scrutiny in a series of cases. In *Daniels v. Williams*, 474 U.S. 327, 331 (1986), this Court observed that "by barring certain government actions regardless of the fairness of the procedures used to implement them," substantive due process "serves to protect governmental power from being 'used for purposes of oppression'" (citation omitted). The Court noted that "[h]istorically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property" (emphasis in original), in such contexts as real estate assessment, driver's license suspension, student corporal punishment, and intentional destruction of a prison inmate's property. *Id.* By the same token, substantive due

process does not restrain negligent acts of state officials which cause unintended loss or injury, *see Daniels, id.*; or to lack of due care by prison officials. *Davidson v. Cannon*, 474 U.S. 344 (1986). Rather, substantive due process operates to prevent public officials from "abusing governmental power, or employing it as an instrument of oppression. . . ." *Id.* at 348.

In such situations, the Court consistently has weighed "the individual's interest in liberty against the State's asserted reasons for restraining individual liberty." *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982). This analysis consists of a two-part test, which demands that a law "shall not be unreasonably arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

Apart from the First and Seventh Circuits, the courts of appeals have applied these standards in property rights cases analogous to the present litigation, consistently holding that facts like those alleged here state a substantive due process cause of action under 42 U.S.C. § 1983. In *Brady v. Town of Colchester*, 863 F.2d 205 (2nd Cir. 1988), for instance, the Second Circuit overturned summary judgment that was granted against a claim that a building permit was impermissibly revoked. Cautioning that "'federal courts should not become zoning boards of appeal'" and that a § 1983 cause of action is not established "every time a local zoning board makes an incorrect decision," the court nonetheless held that the plaintiffs had alleged facts that could allow them to "prove that they were denied a permit not because of a

good faith mistake . . . but because of indefensible reasons such as impermissible political animus." *Id.* at 215-216 (citation omitted). *Accord, Littlefield v. City of Afton*, 785 F.2d 596, 605-607 (8th Cir. 1986) (reviewing like holdings of the Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits).

Likewise, in *Bello v. Walker*, 840 F.2d 1124, 1129-1130 (3rd Cir.), *cert. denied*, 488 U.S. 851 (1988), the Third Circuit overturned a summary judgment award in favor of a municipality that allegedly delayed consideration of a building permit, since the plaintiffs

presented evidence from which a fact finder could reasonably conclude that certain council members . . . improperly interfered with the process by which the municipality issued building permits, and that they did so for partisan political or personal reasons unrelated to the merits of the application for the permits. These actions can have no relationship to any legitimate governmental objective, and if proven, are sufficient to establish a substantive due process violation actionable under section 1983.

In *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988), the Ninth Circuit held that a denial of a building permit under circumstances similar to the present case amounted to a constitutional violation. As the court summarized the facts,

The City Council voted to withhold Bateson's building permit without providing Bateson with any process, let alone "due" process. This sort of arbitrary administration of the local regulations, which singles out one individual to be treated

discriminatorily, amounts to a violation of that individual's substantive due process rights.

Id. at 1303.

These precedents do not give courts open-ended authority, but limit substantive due process scrutiny to the most outrageous abuses of government power. As Judge Kozinski summarized the applicable parameters in *Sinaloa Lake*, 882 F.2d at 1409:

To be sure, governmental entities must have much latitude in carrying out their police power responsibilities; mere errors of judgment, or actions that are mistaken or misguided, do not violate due process. But malicious, irrational and plainly arbitrary actions are not within the legitimate purview of the state's power.

As the First Circuit itself observed in *Amsden v. Moran*, 904 F.2d 748, 754 n.5 (1st Cir. 1990), *cert. denied*, 111 S.Ct. 713 (1991), "In the substantive due process context, the requisite arbitrariness and caprice must be stunning, evidencing more than humdrum legal error." To characterize as "humdrum legal error" the facts alleged in the complaint here – a 15-year pattern of delay, deception, and politically motivated manipulation of the building permit process – is to trivialize, and indeed to negate altogether, the precious private property rights that are at the core of the Fourteenth Amendment's guarantee. We therefore urge the Court to agree with the precedents of the majority of circuits that facts such as these state a substantive due process claim under 42 U.S.C. § 1983.

C. The substantive due process claim alleged here is complementary to, but not duplicative of, a takings claim under the Fifth Amendment. Many of the lawsuits challenging arbitrary denials of property development rights allege both "takings" claims under the Fifth Amendment as well as substantive due process claims under the Fourteenth Amendment. While these claims often overlap, we believe it essential to preserve a separate substantive due process cause of action for arbitrary and oppressive actions that impair property rights.

The first and most important distinction between the two causes of action in this context is that the takings clause generally "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987)(citations omitted). Unlike substantive due process, which seeks to prevent government officials from "abusing governmental power, or employing it as an instrument of oppression," *Davidson*, 474 U.S. at 348, the takings clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." *First English*, 482 U.S. at 314-315 (emphasis in original). Hence, while compensation may be available even for temporary takings that "deny a landowner all use of his property," *id.* at 318, a "substantive due process claim does not require proof that all use of the property has been denied [citation omitted], but rather that the interference with property rights was irrational or arbitrary." *Bateson v. Geisse*, 857 F.2d at 1303.

Moreover, although this Court has suggested that a taking of private property may be proscribed if it is not rationally related to a legitimate public purpose, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984), substantive due process is more amenable to equitable relief, such as writs of mandamus, that are often necessary to vindicate the property rights at issue. This is especially significant in light of a number of decisions holding that takings claims are not ripe until state compensation proceedings are exhausted, whereas federal substantive due process claims are ripe the moment the constitutional injury occurs. See, e.g., *Sinaloa Lake*, 882 F.2d at 1402-1404 and 1407; accord, *Bateson v. Geisse*, *supra*; *Littlefield v. City of Afton*, *supra*. In the instant case, plaintiffs have alleged constant delays in processing their permit applications and that state procedures are unavailing to protect their constitutional rights; hence, immediate equitable relief is the only meaningful remedy to vindicate their rights.

Finally, takings claims offer limited recourse where the governmental actions do not involve a physical taking of real property, but rather the opportunity to pursue a profession or occupation. In these situations, substantive due process and equal protection are among the few available limitations of oppressive governmental actions that impair economic liberties protected under the Fourteenth Amendment. See *Yick Wo*, *supra*. As a consequence, we urge the Court to preserve carefully defined substantive due process protections for property rights.

CONCLUSION

For all the foregoing reasons, *amicus curiae* Institute for Justice respectfully requests that this honorable Court reverse the opinion below.

Respectfully submitted,

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No. 91-122

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

PFZ PROPERTIES, INC.,

Petitioner,

v.

RENE ALBERTO RODRIGUEZ, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

BRIEF OF *AMICI CURIAE*
THE WASHINGTON LEGAL FOUNDATION
AND THE ALLIED EDUCATIONAL FOUNDATION
IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether an arbitrary, capricious, or illegal denial of a construction permit to a developer by officials acting under color of state law can state a substantive due process claim under 42 U.S.C. § 1983.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE FOUNDING GENERATION CREATED THE SYSTEM OF FEDERALISM TO ENSURE THE PROTECTION OF ESTABLISHED RIGHTS FROM INTRUSIVE GOVERNMENTAL INTERFERENCE. THE CONCEPT OF PROPERTY IS ONE OF THE NARROW CLASS OF CONSTITUTIONALLY PROTECTABLE RIGHTS RECOGNIZED BY THE FOUNDING GENERATION. ACCORDINGLY, THE PRINCIPLES OF FEDERALISM PERMIT THE INTERVENTION INTO "LOCAL" AFFAIRS FOR THE PROTECTION OF PROPERTY RIGHTS UNDER SUBSTANTIVE DUE PROCESS ANALYSIS	5
A. This Distribution of Authority Between the Central and State Governments Was a Conscious Effort by the Founding Generation To Curb Governmental Excess	6
B. The Significance of Property Rights to the Founding Generation and the Protection Afforded Those Rights in the Constitution Support, Under Federalism Principles, Federal Intervention in a Traditionally Local Matter	9
CONCLUSION	12

TABLE OF AUTHORITIES

Cases:

<i>Coniston Corp. v. Village of Hoffman Estates</i> , 844 F.2d 461 (7th Cir. 1988)	11
<i>Euclid v. Ambler Realty Co.</i> , 272 U.S. 365 (1926)	10, 11
<i>Federal Regulatory Comm'n v. Mississippi</i> , 456 U.S. 742 (1982)	6, 7
<i>Izquierdo Prieto v. Mercado Rosa</i> , 442 U.S. 465 (1979)	9
<i>Moore v. City of East Cleveland, Ohio</i> , 431 U.S. 494 (1977)	6, 10, 11
<i>Patsy v. Florida Int'l Univ.</i> , 634 F.2d 900 (5th Cir. 1981), <i>rev'd</i> <i>on other grounds</i> , 457 U.S. 496 (1982)	6
<i>Raskiewicz v. Town of New Boston</i> , 754 F.2d 38 (1st Cir.), <i>cert. denied</i> , 474 U.S. 845 (1985)	12
<i>Smithfield Concerned Citizens v. Town of Smithfield</i> , 719 F. Supp. 75 (D.R.I. 1989), <i>aff'd</i> , 907 F.2d 239 (1st Cir. 1990)	12
<i>Torres v. Commonwealth of Puerto Rico</i> , 442 U.S. 465 (1979)	9
<i>Younger v. Harris</i> , 401 U.S. 37 (1971)	7, 8

Amendments:

U.S. CONST. amend. V	9
U.S. CONST. amend. XIV § 1	9

Miscellaneous:

<i>The Federalist</i> , No. 10 (J. Cooke ed. 1961)	10
<i>The Federalist</i> , No. 14 (J. Cooke ed. 1961)	6
<i>The Federalist</i> , No. 39 (J. Cooke ed. 1961)	5
<i>The Federalist</i> , No. 81 (J. Cooke ed. 1961)	7
<i>Constitutionalism and Democracy</i> (J. Elster & R. Slugsted eds. 1988)	9
<i>The Papers of James Madison</i>	7
<i>The Papers of Thomas Jefferson</i> (1958)	7

<i>The Records of the Federal Convention of</i> 1787 (1911)	10
<i>The Writings of James Madison</i> (1906)	10
Brennan, <i>State Constitutions and the Protection</i> <i>of Individual Rights</i> , 90 Harv. L. Rev. 503 (1977)	5
Michelman, <i>Takings</i> , 1987, 88 Colum. L. Rev. 1600 (1988)	10
O'Brien, <i>The Framers' Muse on Republicanism, The</i> <i>Supreme Court, and Pragmatic Constitutional</i> <i>Interpretivism</i> , 8 Const. Commentaries 119 (1991)	7
Shklar, <i>Publius and the Science of the Past</i> , 86 Yale L.J. 1286 (1977)	6
Underkuffler, <i>On Property: An Essay</i> , 100 Yale L.J. 127 (1990)	9, 10

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INTEREST OF THE *AMICI*

The Washington Legal Foundation (WLF) is a national non-profit public interest law and policy center with more than 120,000 members throughout the United States. WLF engages in litigation and matters promoting the free enterprise system and the economic and civil liberties of individuals and businesses.

WLF has a record of longstanding interest and involvement regarding the issue of the constitutional

protections of individual property rights. In pursuit of its view that protection of property rights was of paramount concern to the Framers of the Constitution, WLF has filed briefs *amicus curiae* in many of the leading Supreme Court cases in the area. See, e.g., *General Motors v. Romein*, No. 90-1390, *cert. granted*, 111 S. Ct. 2008 (May 13, 1991); *Yee v. Escondido*, No. 90-1947, *cert. granted*, 112 S. Ct. 294 (Oct. 15, 1991).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus* before this Court on a number of occasions.

Amici's brief will focus on an argument raised by Respondents in their brief in opposition to the petition for a writ of certiorari. Respondents argue that federalism concerns dictate that the Court exercise "caution and restraint" in this case, because the case "concerns a matter uniquely in the domain of a state's interest in its land development and environmental policies." Brief in Opposition at 26. *Amici* disagree with that premise. Although the Court no doubt should always act with caution in defining the contours of substantive due process rights, "federalism" concerns cut in favor of Petitioners, not Respondents. In defining the respective spheres of influence of national and local governments, the Founding Generation made clear that governments at *all* levels should be vigilant in protecting individuals and their property from arbitrary government power. Accordingly, this is a case in which the Founding Generation would have approved of federal courts stepping in to scrutinize carefully the local government actions at issue.

In light of this brief's focus on the role of federal courts in protecting property rights rather than on the merits of Petitioner's substantive due process claim, it brings to the attention of the Court issues that may not be brought to the Court's attention by any of the parties.

Although *amici* do not directly address the substantive due process issues raised in this case, *amici* fully support Petitioner's contention that the Constitution grants all citizens a substantive due process right not to be deprived of life, liberty, or property as a result of arbitrary, bad-faith government conduct, and that Petitioner's complaint states a claim for violation of that right.

Amici file this brief with the written consent of all parties.

STATEMENT OF THE CASE

In the interests of brevity, *amici* adopt by reference the Statement of the Case contained in Petitioner's brief.

In brief, this case arises out of a dispute over the development of a large residential and tourist project in the Commonwealth of Puerto Rico. Petitioner PFZ Properties, Inc. ("PFZ") filed a complaint in December of 1987 in the District Court for the District of Puerto Rico, alleging a violation of 42 U.S.C. § 1983. In an amended complaint filed in October 1988, PFZ alleged that the Respondents, Rene Rodriguez and a body known as the Regulations and Permits Authority of the Commonwealth of Puerto Rico, had violated PFZ's rights to procedural and substantive due process under the Fourteenth Amendment.

Upon the completion of discovery, the District Court granted a motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. PFZ filed a timely appeal. On March 18, 1991, the Court of Appeals for the First Circuit affirmed the dismissal.

On July 22, 1991, PFZ filed its petition for writ of certiorari with this Court. The Court granted PFZ's writ, limited to the issue of whether an arbitrary, capricious, or illegal denial of a construction permit to a developer by officials acting under color of state law is actionable under

42 U.S.C. § 1983 as a violation of substantive due process rights.

SUMMARY OF ARGUMENT

Federalism principles do not caution against recognition of the substantive due process right asserted by Petitioner. A review of the Founding Generation's development of the Constitution and republican form of government demonstrates that they viewed the balance and interplay between the federal and state governments as a means of enhancing individual rights, and not principally as a means of protecting state governments against encroachment by federal authorities.

—The Founding Generation viewed the protection of property as a primary purpose of Government. The Constitution and our constitutional form of government were designed to protect property rights at both the state and federal level. Accordingly, the principles of federalism formulated by the Founding Generation specifically envision federal intervention into the type of case presented at bar.

ARGUMENT

- I. **THE FOUNDING GENERATION CREATED THE SYSTEM OF FEDERALISM TO ENSURE THE PROTECTION OF ESTABLISHED RIGHTS FROM INTRUSIVE GOVERNMENTAL INTERFERENCE. THE CONCEPT OF PROPERTY IS ONE OF THE NARROW CLASS OF CONSTITUTIONALLY PROTECTABLE RIGHTS RECOGNIZED BY THE FOUNDING GENERATION. ACCORDINGLY, THE PRINCIPLES OF FEDERALISM PERMIT THE INTERVENTION INTO "LOCAL" AFFAIRS FOR THE PROTECTION OF PROPERTY RIGHTS UNDER SUBSTANTIVE DUE PROCESS ANALYSIS.**

The drafters of the Constitution adopted a form of government that contained two distinct and viable structures: a centralized national government and more localized, state-focused governments.

The proposed constitution . . . is in strictness neither a national nor a federal constitution; but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them again, it is federal, not national; and finally, in the authoritative mode of introducing amendments, it is neither wholly federal, nor wholly national.

The Federalist No. 39 (J. Cooke ed. 1961).¹

The dual system of government "provides a double source of protection for the rights of [United States] citizens." Brennan, *State Constitutions and the Protection*

¹All references to *The Federalist* are to the J. Cooke edition.

of *Individual Rights*, 90 Harv. L. Rev. 489, 503 (1977), quoted in *Patsy v. Florida Int'l University*, 634 F.2d 900, 923 (5th Cir. 1981), rev'd on other grounds, 457 U.S. 496 (1982), and "provides a salutary check on governmental power." *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 790 (1982) (O'Connor, J., dissenting).

The concept of federalism was born from the idea "that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects which concern all the members of the republic but which are not attained by the separate provisions of any. The subordinate governments . . . will retain their due authority and activity." *The Federalist* No. 14. When, however, the exercise of state authority impinges upon a historically established constitutionally protected right, the principles of federalism allow intervention into areas traditionally reserved to the states. See, *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 502 (1977) (plurality opinion). The protection of property rights qualifies as an area appropriate for federal government intervention.

A. This Distribution of Authority Between the Central and State Governments Was A Conscious Effort By the Founding Generation To Curb Governmental Excess.

A central concern of the debate between federalists and anti-federalists over the adoption of the Constitution was the impact the new republic would have on its citizens. Anti-federalists feared that the proposed governmental structure and size would lead to a passive population and ultimately to a class of leaders who were unfamiliar with the populous. The federalists, conversely, feared a tyranny by the majority, disruptive legislatures, and a lack of authoritative leaders. Shklar, *Publius and the Science of the Past*, 86 Yale L.J. 1286, 1287-1290 (1977). The common thread throughout these disparate views was the fear of the loss of rights. "To curb this evil, [the

Founding Generation] allocated governmental power between state and national authorities" *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. at 790.

Moreover, the fear of legislative abuses caused the anti-federalists to demand the adoption of a declaration of rights. The federalists, led by Alexander Hamilton, believed that a bill of rights was not necessary "since the national government was limited to exercising expressly delegated powers. . . ." O'Brien, *The Framers' Muse on Republicanism, The Supreme Court, and Pragmatic Constitutional Interpretivism*, 8 Const. Commentaries 119, 131 (1991) (citing *The Federalist* No. 81). While initially opposing the idea of a bill of rights, James Madison became a champion of the adoption of a declaration of rights for the Constitution. He stated, "If there was reason for restraining state government . . . there is like reason for restraining federal government." *Id.* at 135 (quoting Madison, *Amendments to the Constitution* (June 8, 1789), reprinted in 12 *The Papers of James Madison* at 206).

To Thomas Jefferson and others of the Founding Generation, the natural extension of the jealous protection of individual rights against government was "the legal check which [the Bill of Rights] puts in the hands of the judiciary." *Id.* at 134 (quoting 14 *The Papers of Thomas Jefferson* 659 (1958)). The purpose of this "check" was to form "an impenetrable bulwark against every assumption of power in the legislative or executive . . . [and] to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights." *Id.* (quoting Madison, *Amendments to the Constitution* at 206-07).

In the case at bar, the inquiry on the issue of federalism is when can the federal arm of our system intervene in traditionally local affairs. In writing for the Court in *Younger v. Harris*, 401 U.S. 37 (1971), Justice Black succinctly spelled out the circumstances under which

federalism concerns would lead a federal court to refrain from interfering with the actions of a state government:

[T]he notion of "comity," that is, a proper respect for state functions, [is] a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for the lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these causes. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id. at 44.

Under Justice Black's understanding, the principles of "Our Federalism" do not discourage intervention by the federal courts into state-law matters provided that they may do so without doing violence to state prerogatives. As argued *infra*, the instant case raises claims of state interference with individual rights considered so fundamental by the Founding Generation that federalism concerns do not counsel against federal court intervention.

B. The Significance of Property Rights to the Founding Generation and the Protection Afforded Those Rights in the Constitution Support, Under Federalism Principles, Federal Intervention in a Traditionally Local Matter.

Two amendments to the Constitution protect property rights: the Fifth Amendment ("No person shall be . . . deprived of life, liberty or property, without due process of law,") and the Fourteenth Amendment ("or shall any State deprive any person of life, liberty, or property, without due process of law . . .").² In fact,

For the Founding Generation . . . property [was] more than simply an imaginative or symbolic concept: it [was] the medium through which struggles between individual and collective goals [were] refracted. Protection of individual property rights cut across all parts of the political spectrum and advanced radically different visions of the values to be protected in American society.

Underkuffler, *On Property: An Essay*, 100 Yale L.J. 127, 128 (1990) (footnotes omitted).

The bundle of rights incident to property ownership, i.e., "the individual's right to unfettered possession, disposition and use of material . . . 'held a special place in [The Founding Era's] law, republican theory and society.'" *Id.* at 132 (quoting Nedelsky, *American Constitutionalism and The Paradox of Private Property*, in *Constitutionalism and Democracy*, 241, 252 n.19 (J. Elster & R. Slugsted eds. 1988)).

²Federal courts have not definitively decided whether the Fifth Amendment's or Fourteenth Amendment's Due Process Clause applies to the Commonwealth of Puerto Rico. *Torres v. Commonwealth of Puerto Rico*, 442 U.S. 465, 469 (1979); *Izquierdo Prieto v. Mercado Rosa*, 894 F.2d 467, 468 n.2 (1st Cir. 1990).

The protection of private property has long been inextricably linked to personal freedoms: "[P]roperty was [the] inspiration for the idea of a private sphere of individual self-determination securely bound off from politics by law . . . Property could bear such a heavy and crucial ideological load because it was itself such a natural part of normative political imagination" *Id.* (quoting Michelman, *Takings*, 1987, 88 Colum. L. Rev. 1600, 1626-27 (1988)). The Founding Generation firmly believed that "the '[o]ne great obj[ect] of Gov[ernment] is personal protection and the security of Property.'" *Id.* at 134 (quoting 1 *The Records of The Federal Convention of 1787*, 302 (M. Farrand ed. 1911)).³ Madison flatly stated that "[g]overnment is instituted to protect property of every sort" *Id.* at 135 (quoting J. Madison, *Property*, in 6 *The Writings of James Madison*, 101 (G. Hunt ed. 1906)).

Undeniably, the primary source of protection of property interests rests with state and local governments. "Long before the original States adopted the Constitution, the common law protected an owner's right to decide how best to use his own property." *Moore*, 431 U.S. at 513 (Stevens, J., concurring). Yet, the U.S. Constitution also has an important role to play in protecting property rights:

The holding in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 [(1926)], that a city could use its police power, not just to abate a specific use of property which proved offensive, but also create and implement a comprehensive plan for the use of land in the community, vastly diminished the rights of individual property owners. It did not, however, totally extinguish those rights. On the contrary, that case expressly recognized that the broad

³James Madison noted that the interests of "[t]hose who hold, and those who are without property, have ever formed distinct interests in society." *The Federalist* 10, quoted in Underkuffler, *supra*, at 134.

zoning power must be exercised within constitutional limits.

Moore, 431 U.S. at 513-514.

If, in fact, the state regulation of property rights is constrained by substantive due process concerns, intervention by the federal courts in this type of matter adheres to the highest ideals of federalism: the protection of federal rights without unduly interfering with the legitimate interest of the locality.

Federal intervention into cases of this type could never constitute undue interference with state government affairs so long as federal courts apply a deferential standard of review, akin to the test applied in *Moore*: "[B]efore [a zoning] ordinance can be declared unconstitutional, [it must be shown to be] clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Moore*, 431 U.S. at 514 (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. at 395) (emphasis deleted). That standard of review also has been applied in the review of the denial of individual zoning applications. See, e.g., *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988) (individual zoning decisions can violate substantive due process rights only if decision is irrational).⁴

Since the standard articulated in *Moore* and *Euclid* presumes both the constitutionality and the rationality of challenged local actions, intervention by federal courts does not upset the delicate balance of federalism. The articulated standard prevents a court from becoming a

⁴By referring to the "substantial relation" test, *amici* do not mean to imply that the review of property rights must proceed under this standard. On the contrary, *amici* would, under the appropriate circumstances, argue that the Court should re-examine its view of the fundamental nature of property rights in constitutional law. The instant case in its present posture, however, does not squarely present that issue.

"super zoning board" that supplants its judgment for that of local authorities. See *Raskiewicz v. Town of New Boston*, 754 F.2d 38, 44 (1st Cir.), *cert. denied*, 474 U.S. 845 (1985); *Smithfield Concerned Citizens v. Town of Smithfield*, 719 F. Supp. 75, 81 (D.R.I. 1989), *aff'd*, 907 F.2d 239 (1st Cir. 1990). "Thus, the relevant inquiry is not whether the claimant or the Court agrees with the legislative body's judgment; but, rather, whether the rationality of that judgment is 'at least debatable.' If it is, the requirements of due process are satisfied." *Smithfield Concerned Citizens*, 719 F. Supp. at 81.

In sum, any suggestion that the review of the instant case by the federal courts would offend principles of federalism simply is not warranted. While the protection of property rights historically has rested with state and local governments, the Founding Generation clearly contemplated that the federal courts would also play a major role in defending private property rights from state government intrusions.

CONCLUSION

Amici curiae Washington Legal Foundation and the Allied Educational Foundation respectfully request that the judgment of the First Circuit be reversed.

Respectfully submitted,

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No. 91-122

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PFZ PROPERTIES, INC.,

Petitioner,

vs.

RENE ALBERTO RODRIGUEZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

MOTION OF THE NATIONAL ASSOCIATION OF HOME
BUILDERS FOR LEAVE TO FILE AN AMICUS CURIAE
BRIEF AND BRIEF IN SUPPORT OF THE PETITIONER

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Respondents.

**MOTION OF THE NATIONAL ASSOCIATION OF
HOME BUILDERS FOR LEAVE TO FILE AN AMICUS
CURIAE BRIEF IN SUPPORT OF THE PETITIONER**

The National Association of Home Builders ("NAHB") has requested the consent of the parties to file an *amicus curiae* brief in favor of the petitioner. As shown by the letter filed with the Clerk of this Court, the petitioner has consented; the respondents have declined to respond to our request.

Therefore, pursuant to Rule 37.4 of the Rules of the Supreme Court of the United States, the NAHB hereby moves this Court for leave to file the attached *amicus curiae* brief on behalf of the petitioner.

I.

**THE NAHB'S INTEREST ARISES FROM THE
CONCERNS OF ITS MEMBERS WITH THEIR ABILITY
TO OBTAIN JUDICIAL REVIEW OF STATE ACTION
WHICH DEPRIVES THEM OF THEIR RIGHT TO ENJOY
PROPERTY CREATED BY STATE LAW**

The NAHB represents over 153,000 builder and associate members throughout the United States. Its members include not only people and firms that construct and supply single family homes but also apartment, condominium, commercial, and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry. It is, therefore, concerned with any judicial decision that calls into question the ability of its members to exercise property rights created by state law.

The NAHB has been before the Court as an *amicus curiae* or as "of counsel" to the property owner in a number of cases involving the rights of landowners to use their property and the remedy to be applied when those rights are interfered with. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).¹ It asks leave to file its *amicus curiae* brief in the present case in

¹ The Court's opinion cited the NAHB'S brief. 483 U.S. at 840.

order to assist this Court in determining whether local governmental action which arbitrarily and capriciously interferes with the enjoyment of a property right created by state law constitutes a violation of the substantive due process clause of the Fourteenth Amendment to the Constitution.

Dated: December 27, 1991

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	2
I. THE FIRST CIRCUIT HAS REFUSED TO RECOGNIZE THAT A LANDOWNER HAS A PROPERTY RIGHT IN THE USE OF ITS LAND	2
II. ARBITRARY AND UNREASONABLE GOVERNMENTAL ACTION WHICH IN- TERFERES WITH THE USE OF LAND VIOLATES A LANDOWNER'S RIGHT TO SUBSTANTIVE DUE PROCESS	5
III. WHILE THE FIRST CIRCUIT STANDS ALONE IN ITS REFUSAL TO RECOG- NIZE THE POSSIBILITY OF A SUBSTAN- TIVE DUE PROCESS VIOLATION IN THE LAND USE CONTEXT, ITS POSITION IS BEGINNING TO INFLUENCE OTHER FEDERAL CIRCUITS	7
A. The First Circuit's Position Is Contrary To The Position Of Every Other Circuit Which Has Addressed The Question	7
B. The First Circuit's Position Has Begun To Influence The Way Some Other Cir- cuits Are Reviewing Local Government's Refusals To Issue State Mandated Land Use Approvals	8
IV. THERE IS MORE THAN ADEQUATE PROTECTION UNDER FEDERAL LAW TO ENSURE THAT FEDERAL COURTS DO NOT BECOME ZONING BOARDS OF APPEALS	10
CONCLUSION	12

TABLE OF AUTHORITIES

CASES	Page
<i>Bateson v. Geisse</i> , 857 F.2d 1300 (9th Cir. 1988) .	8
<i>Bello v. Walker</i> , 840 F.2d 1124 (3d Cir. 1988)	7
<i>Board of Supervisors v. Southland Corporation</i> , 224 Va. 514, 297 S.E.2d 718 (1982)	11
<i>Carter v. Rollins Cablevision of Massachusetts, Inc.</i> , 634 F.Supp. 944 (D. Mass. 1986)	3
<i>City of Eastlake v. Forest City Enterprises, Inc.</i> , 426 U.S. 668 (1976)	6
<i>Condor Corp. v. City of St. Paul</i> , 912 F.2d 215 (8th Cir. 1990)	9
<i>Coniston Corp. v. Village of Hoffman Estates</i> , 844 F.2d 461 (7th Cir. 1988)	8
<i>Creative Environments, Inc. v. Estabrook</i> , 680 F.2d 822 (1st Cir. 1982)	3,8,10
<i>Crooked Lake Development, Inc. v. Emmet County</i> , 763 F.Supp. 1398 (W.D. Mich. 1991)	10
<i>Dennis v. Higgins</i> , — U.S. —, 111 S.Ct. 865 (1991)	3
<i>G. M. Engineers & Associates, Inc. v. West Bloomfield Township</i> , 922 F.2d 328 (6th Cir. 1990)	9
<i>Harding v. County of Door</i> , 870 F.2d 430 (7th Cir. 1989)	9
<i>Lemke v. Cass County</i> , 846 F.2d 469 (8th Cir. 1987)	9
<i>Littlefield v. City of Afton</i> , 785 F.2d 596 (8th Cir. 1986)	7
<i>Lynch v. Household Finance Corp.</i> , 405 U.S. 538 (1972)	3
<i>Moore v. City of East Cleveland</i> , 431 U.S. 494 (1977)	6
<i>Nectow v. City of Cambridge</i> , 277 U.S. 183 (1928)	6

Table of Authorities Continued

	Page
<i>Nollan v. California Coastal Commission</i> , 483 U.S. 825 (1987)	3
<i>Polenz v. Parrott</i> , 883 F.2d 551 (7th Cir. 1989) ...	7
<i>PFZ Properties, Inc. v. Rodriguez</i> , 928 F.2d 28 (1st Cir. 1991)	3-5,7,10
<i>Sanderson v. Village of Greenhills</i> , 726 F.2d 284 (6th Cir. 1984)	7
<i>Schad v. Borough of Mt. Ephraim</i> , 452 U.S. 61 (1981)	6
<i>Scott v. Greenville County</i> , 716 F.2d 1409 (4th Cir. 1983)	7
<i>Southern Cooperative Development Fund v. Driggers</i> , 696 F.2d 1347 (11th Cir. 1983)	8
<i>Sullivan v. Town of Salem</i> , 805 F.2d 81 (2d Cir. 1986)	7
<i>State of Washington ex rel. Seattle Title Trust Co. v. Roberge</i> , 278 U.S. 116 (1928)	2
<i>United States v. Locke</i> , 471 U.S. 84 (1985)	6
<i>Village of Euclid v. Ambler Realty Co.</i> , 272 U.S. 365 (1926)	5,6,9,11
<i>Williamson County Regional Planning Commission v. Hamilton Bank</i> , 473 U.S. 172 (1985)	6,10
MISCELLANEOUS:	
1 Ziegler, Rathkopf's <i>The Law of Zoning and Planning, Shift in Burden of Proof</i> , § 5.02[3] (1991)	11

IN THE
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OCTOBER TERM, 1991

No. 91-122

PFZ PROPERTIES, INC.,
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vs.

RENE ALBERTO RODRIGUEZ, *et al.*,
Respondents.

**BRIEF OF THE NATIONAL ASSOCIATION OF
HOME BUILDERS AS AMICUS CURIAE
IN SUPPORT OF THE PETITIONER**

INTEREST OF THE AMICUS CURIAE

The interest of the *amicus curiae* is set forth in the preceding motion for leave to file this brief.

SUMMARY OF THE ARGUMENT

The substantive due process clause of the Fourteenth Amendment protects state created property rights which, in the context of land use, means the right to obtain governmental approvals subject to reasonable regulation. It has been the rule, repeatedly stated by the Court, that arbitrary and unreasonable actions by local governmental entities violate a landowner's right to substantive due process. Every other

Circuit that has addressed the question has followed the Court's clear statement of the law and has held that a refusal to issue a land use approval to which a landowner is entitled under state law violates the landowner's right to substantive due process.

The First Circuit's fear that applying the protection of substantive due process to arbitrary and unreasonable land use decisions will convert federal courts into zoning boards of appeals overlooks 65 years of deference to local governmental entities' actions in the land use context which means, as a practical matter, that only the truly wrongful decisions are likely to be remedied.

ARGUMENT

I.

THE FIRST CIRCUIT HAS REFUSED TO RECOGNIZE THAT A LANDOWNER HAS A PROPERTY RIGHT IN THE USE OF ITS LAND

"The right of [a landowner] to devote its land to any legitimate use is property within the protection of the Constitution." *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928).

The Court reemphasized the importance of that right almost 20 years ago.

Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in

property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).²

The Court reaffirmed the constitutional protection afforded the right to use property only four years ago: "[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'" *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987).

Notwithstanding the Court's clear statements, the First Circuit has, for over a decade, held strongly to the view that the right of a landowner to use its land free of arbitrary and unreasonable governmental interference is not entitled to constitutional protection. Instead, as far as the First Circuit is concerned, disputes involving the right to use property should be resolved under state law in state courts. *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir.), cert. denied, 459 U.S. 989 (1982).³

It stated that view quite clearly in the case now before the Court, *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 31 (1st Cir. 1991): "This Court has re-

² *Lynch* has been cited with approval as recently as this year. *Dennis v. Higgins*, - U.S. -, 111 S.Ct. 865, 870, 876 (1991).

³ A landowner foolish enough to challenge an unfair land use decision by a local government in the First Circuit is likely to be held to have brought a frivolous action entitling the local government to attorneys' fees under 42 U.S.C. § 1988. *Carter v. Rollins Cablevision of Massachusetts, Inc.*, 634 F.Supp. 944 (D. Mass. 1986).

peatedly held, however, that rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process."

The Court of Appeals recognized that property interests are "defined by state law" and assumed that "PFZ had acquired a legitimate claim of entitlement to approval of the construction drawings and to issuance of a building permit." *Id.*, 928 F.2d at 30. Nevertheless, it held that the ARPE's refusal to comply with state law did not constitute a violation of PFZ's right to substantive due process.

The doctrine of substantive due process "does not protect individuals from all [governmental] actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents 'governmental power from being used for purposes of oppression,' or 'abuse of government power that shocks the conscience,' or 'action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests.'"

Id., 928 F.2d at 31-32.

The Court of Appeals concluded:

Even assuming that ARPE engaged in delaying tactics and refused to issue permits for the Vacía Talega project based on considerations outside the scope of its jurisdiction under Puerto Rico law, such practices, without more, do not rise to the level of violations to the federal constitution under a substantive due process label.

Id., 928 F.2d at 32.

If a court is unwilling to provide constitutional protection to state created property rights, what rights will it protect? The remainder of this brief will demonstrate that the First Circuit's position is wrong as a matter of both precedent and policy.

II.

ARBITRARY AND UNREASONABLE GOVERNMENTAL ACTION WHICH INTERFERES WITH THE USE OF LAND VIOLATES A LANDOWNER'S RIGHT TO SUBSTANTIVE DUE PROCESS

The Court has, for the last 65 years, reviewed land use decisions to determine if they violated the landowner's right to substantive due process. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the seminal land use case, involved an attack on zoning which was "... assailed on the grounds it is in derogation of section 1 of the Fourteenth Amendment of the federal Constitution in that it deprives appellee of liberty and property without due process of law" *Id.*, 272 U.S. at 384.

The Court then set forth the basis on which a determination could be made as to whether governmental action constituted a deprivation of property without due process of law: "... before the ordinance can be declared unconstitutional [it must be shown], that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Id.*, 272 U.S. at 395.

Village of Euclid and its statement as to the role of substantive due process in the land use context

are still good law. *United States v. Locke*, 471 U.S. 84, 104 (1985); *Moore v. City of East Cleveland*, 431 U.S. 494, 498 n.6 (1977); and *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 676 (1976).

The Court upheld zoning against a facial attack in *Village of Euclid*. Two years later, in *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), the Court held that the application of a zoning regulation to a particular piece of property was invalid. "The attack upon the ordinance is that, as specifically applied to plaintiff in error, it deprived him of his property without due process of law in contravention of the Fourteenth Amendment." *Id.*, 277 U.S. at 185.

Nectow, like *Village of Euclid*, is still good law. See, e.g., *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 (1981).

Finally, the Court still reviews governmental actions involving land use to see if the dictates of substantive due process have been complied with. See, e.g., *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 197 (1985) (no violation of substantive due process in the denial of a subdivision map on the facts).

III.

WHILE THE FIRST CIRCUIT STANDS ALONE IN ITS REFUSAL TO RECOGNIZE THE POSSIBILITY OF A SUBSTANTIVE DUE PROCESS VIOLATION IN THE LAND USE CONTEXT, ITS POSITION IS BEGINNING TO INFLUENCE OTHER FEDERAL CIRCUITS

A. The First Circuit's Position Is Contrary To The Position Of Every Other Circuit Which Has Addressed The Question

The only question being reviewed by the Court is whether the "arbitrary, capricious or illegal denial of a construction permit to a developer by officials acting under color of state law can state a substantive due process claim under 42 U.S.C. § 1983." See *PFZ Properties, Inc. v. Rodriguez*, 112 S.Ct. 414 (1991) (No.91-122) (cert. granted limited to question two in the petition).

The First Circuit stands alone in its refusal to provide substantive due process protection to a state created property right. All of the other federal Circuits which have considered the question have held that a governmental entity which refuses to issue a land use approval to which a landowner is entitled under state law violates the landowner's right to substantive due process. See, e.g., *Sullivan v. Town of Salem*, 805 F.2d 81 (2d Cir. 1986) (certificate of occupancy); *Bello v. Walker*, 840 F.2d 1124 (3d Cir.), cert. denied, 488 U.S. 851, 868 (1988) (building permit); *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983) (building permit); *Sanderson v. Village of Greenhills*, 726 F.2d 284 (6th Cir. 1984) (use permit); *Polenz v. Parrott*, 883 F.2d 551 (7th Cir. 1989) (certificate of occupancy); *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir.

1986) (building permit)⁴; *Bateson v. Geisse*, 857 F.2d 1300 (9th Cir. 1988) (building permit); and *Southern Cooperative Development Fund v. Driggers*, 696 F.2d 1347 (11th Cir.), *reh'g denied*, 703 F.2d 582 (11th Cir.), *cert. denied*, 463 U.S. 1208 (1983) (subdivision map).

B. The First Circuit's Position Has Begun To Influence The Way Some Other Circuits Are Reviewing Local Governments' Refusals To Issue State Mandated Land Use Approvals

None of the other Circuits have retreated from the position, set forth in the cases cited in Section III. A., *supra*, that the wrongful refusal of a local government to issue a state mandated land use approval constitutes a violation of a landowner's right to substantive due process. However, several Circuits and the district courts in those Circuits have begun, citing the First Circuit's position, particularly as set forth in *Creative Environments*, *supra*, to apply a standard of review which is tantamount to adopting the First Circuit's position because the result is, uniformly, to uphold the local government's action.

In *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 466 (7th Cir. 1988), the court stated: "No one thinks substantive due process should be interpreted so broadly as to protect landowners against erroneous zoning decisions." *Creative Environments* was cited with approval. *Coniston Corp.*, 844 F.2d at 467.

⁴ As noted in Section III. B., *infra*, the Sixth, Seventh, and Eighth Circuits, under the influence of the First, have begun to back track on their determinations that a refusal to issue a land use approval mandated by state law constitutes a violation of substantive due process.

The result is that the Seventh Circuit has gone far beyond the rule set down by the Court in *Village of Euclid* and now holds that a "zoning decision denies substantive due process only if it is invidious or irrational." *Harding v. County of Door*, 870 F.2d 430, 431 (7th Cir.), *cert. denied*, 493 U.S. 853 (1989).

A concurring opinion in *Lemke v. Cass County*, 846 F.2d 469, 472 (8th Cir. 1987), stated that substantive due process claims in the land use context "... should, however, be limited to the truly irrational—for example, a zoning board's decision made by flipping a coin" The concurrence was based on agreement with the approach taken by the First Circuit. 846 F.2d at 472. See also *Condor Corp. v. City of St. Paul*, 912 F.2d 215, 220 (8th Cir. 1990), which holds that a due process violation can exist in the land use approval context only if it is "egregious" or "irrational".

The Sixth Circuit has decided that substantive due process claims may only be maintained in those situations where "the alleged conduct shocks the conscience of the court." *G. M. Engineers & Associates, Inc. v. West Bloomfield Township*, 922 F.2d 328, 332 (6th Cir. 1990).

A district court in the Sixth Circuit, relying on the First Circuit's approach, has stated: "Plaintiff's allegations of bad faith, abuse of authority, and arbitrary and capricious conduct in local land use proceeding may state a claim under state law, but they fail to state a federal claim under the substantive due process clause of the United States Constitution."

Crooked Lake Development, Inc. v. Emmet County, 763 F.Supp. 1398, 1403 (W.D. Mich. 1991).⁵

Finally, the standards of review quoted above are also being used by the First Circuit. See *PFZ Properties*, 928 F.2d at 31-32, quoted in Section I, *supra*.

IV.

THERE IS MORE THAN ADEQUATE PROTECTION UNDER FEDERAL LAW TO ENSURE THAT FEDERAL COURTS DO NOT BECOME ZONING BOARDS OF APPEALS

The First Circuit indicated in *Creative Environments, supra*, that it did not want to have district courts act as zoning boards of appeals and therefore would not allow "run of the mill" disputes between a landowner and a local governmental entity "to rise to the level of a due process violation." 680 F.2d at 833. In doing so, the First Circuit neglected the procedural protections which have been erected over the years by the Court to ensure that decisions, otherwise proper, by local zoning authorities will not be overturned by a district court merely because it (or a landowner) disagrees with them.

⁵ The district court in *Crooked Lake Development*, 763 F.Supp. at 1404, went even further for it stated "that in local land use disputes the general substantive due process claim is superseded by the specific guarantees contained in the Fifth Amendment's taking clause." This is, of course, in complete disregard of the Court's analysis in *Williamson County Regional Planning Commission v. Hamilton Bank, supra*, 473 U.S. at 186, where the Court first reviewed the landowner's claim under the Just Compensation Clause and then "under the due process theory that petitioners espouse." *Id.*, 473 U.S. at 197.

"If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Village of Euclid, supra*, 272 U.S. at 388. The "fairly debatable" rule means that the local governmental authority is not even required to show that its decision was correct by a preponderance of the evidence; it is enough that it merely adduce evidence to show that its decision was "fairly debatable."

The parameters of the judicial review of legislative zoning decisions are well settled. The action of the local governing body in enacting or amending its zoning ordinance is presumed to be valid. Inherent in the presumption of legislative validity is the presumption that the classification that the ordinance contains, and the distinctions which it draws, are not arbitrary, are not capricious, but reasonable. Where such presumptive reasonableness is challenged by probative evidence of unreasonableness, the ordinance cannot be sustained unless the governing body meets the challenge with some evidence of reasonableness. But the governing body is not required to go forward with evidence sufficient to persuade the fact-finder of reasonableness by a preponderance of the evidence. The burden is less stringent. If evidence of reasonableness is sufficient to make the question 'fairly debatable,' the ordinance must be sustained.

Board of Supervisors v. Southland Corporation, 224 Va. 514, 522-523, 297 S.E.2d 718, 722 (1982). The *Southland* case is typical; see 1 Ziegler, *Rathkopf's*

The Law of Zoning and Planning, Shift in Burden of Proof, § 5.02[3] (1991).

Thus, allowing a landowner to seek judicial review in the federal courts under the substantive due process clause will not, as feared by the First Circuit, mean that every land use decision will immediately be at risk nor that the landowner's lawyer will immediately conclude that the landowner's chance of success is higher in federal court than in state court.

CONCLUSION

The position espoused by the First Circuit is contrary to long established law laid down by the Court. It is contrary to the law established in every other circuit which has considered the question. It establishes a policy which denies landowners their rights to protection which goes back to Magna Carta.

It should not be allowed to stand.

Dated: December 27, 1991

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10
No. 91-122

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

PFZ PROPERTIES, INC.,

Petitioner,

vs.

RENE ALBERTO RODRIGUEZ, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

**BRIEF OF THE MUNICIPAL ART SOCIETY
OF NEW YORK, INC., AMICUS CURIAE,
IN SUPPORT OF AFFIRMANCE**

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
THE SUBSUMED QUESTIONS	2
THE INTEREST OF THE SOCIETY	2
SUMMARY OF ARGUMENT	3
ARGUMENT	4
THE DENIAL OF THE DISCRETIONARY PERMIT DID NOT "DEPRIVE" THE PETITIONER OF ITS "PROPERTY".	4
A. The Meaning of "Deprive"	4
B. The Meaning of "Property"	9
C. Federalism and Judicial Economy	13
CONCLUSION	18

TABLE OF AUTHORITIES

Cases

<u>Board of Regents v. Roth,</u> 408 U.S. 574 (1972)	12
<u>Daniels v. Williams,</u> 474 U.S. 327 (1986)	4, 5, 6, 7, 8, 15
<u>Davidson v. Cannon,</u> 474 U.S. 344 (1986)	5, 8
<u>Dean Tarry Corporation v. Friedlander,</u> 826 F.2d 210 (2d Cir. 1987) . .	12
<u>DeShaney v. Winnebago County Department of Social Services,</u> 489 U.S. 189 (1989)	15
<u>Lucas v. South Carolina Coastal Commission,</u> No. 91-453, October Term, 1991 .	2
<u>McCulloch v. Maryland,</u> 4 Wheat. 316 (1819)	8
<u>Parratt v. Taylor,</u> 451 U.S. 527 (1981)	6, 16
<u>Paul v. Davis,</u> 424 U.S. 693 (1976)	9, 15
<u>PFZ Properties, Inc. v. Rodriguez,</u> 928 F.2d 28 (1st Cir. 1991) . .	10
<u>Preseault v. Interstate Commerce Commission,</u> 494 U.S. 1 (1990)	10

Rogin v. Bensalem Township,
616 F.2d 680 (3rd Cir. 1980),
cert. denied 450 U.S. 1029
(1981) 13

RRI Realty Corp. v. Village of
Southampton,
870 F.2d 911 (1989), cert.
denied 493 U.S. 893 (1990) . . . 12

Village of Belle Terre v. Boraas,
416 U.S. 1 (1974) 7

Yale Auto Parts, Inc. v. Johnson,
758 F.2d 54
(2nd Cir. 1985) 7, 10, 14

Statutes

Federal

Administrative Procedure Act
§ 10(e), 5 U.S.C. § 706
(1991) 7

42 U.S.C. § 1983 2, 6, 16

Local

P.R. Laws Ann. tit. 23, § 743
(1988) 7

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COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF THE MUNICIPAL ART SOCIETY OF NEW YORK, INC., AMICUS CURIAE, IN SUPPORT OF AFFIRMANCE

The Municipal Art Society of New York, Inc. (the "Society"), amicus Curiae, submits that two other questions are subsumed by the question presented. They have not been answered by the Court in the context of land use regulation.

THE SUBSUMED QUESTIONS

When there has been an "arbitrary, capricious or illegal" denial of permission that is required by valid legislation for a particular use of land and the denial is not the result of animus or a violation of another constitutional protection, is the landowner

(1) "deprived" as a matter of substantive due process

(2) of "property" within the meaning of the Fourteenth Amendment so that the owner has a claim under 42 U.S.C. § 1983?

THE INTEREST OF THE SOCIETY

The Society is a New York not-for-profit corporation founded in 1892. It has a real and substantial interest in the outcome of this case and in the outcome of No. 91-453, October Term, 1991, Lucas v. South Carolina Coastal

Commission, which also presents important questions concerning land use regulation. The objective of the Society is "to work towards the creation of a livable city . . . and, particularly, to use the Municipal Arts of Architecture, Landscape Architecture, Planning, Preservation and Public Art to improve and protect the physical environment of New York." As a particular example, there are more than 500 miles of riverine, estuarine and ocean waterfront within the city; the City Planning Commission is studying a comprehensive plan for the use of its waterfront that will be consistent with federal and state coastal zone management statutes.

SUMMARY OF ARGUMENT

The allegedly "arbitrary, capricious or illegal" denial of a construction permit did not, within the

meaning of the Fourteenth Amendment, "deprive" petitioner of its "property."

To conclude otherwise would make the federal courts the tribunals of review of particular land use decisions, would do violence to the federal structure of the Constitution by involving the federal courts in an area of particular state interest and would severely impair the capacity of the federal courts to administer justice in the controversies actually entrusted to them.

ARGUMENT

THE DENIAL OF THE DISCRETIONARY PERMIT DID NOT "DEPRIVE" THE PETITIONER OF ITS "PROPERTY".

A. The Meaning of "Deprive"

Loss of an economic benefit caused by an official act is not ipso facto a "deprivation" of "property." Daniels v. Williams, 474 U.S. 327, 328 (1986). To hold otherwise "would trivialize the

centuries-old principle of due process of law." Id. at 332. The Constitution "deals with large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liabilities for injury that attend living together in society." Id.; see also, Davidson v. Cannon, 474 U.S. 344 (1986).

Here, the claim of official misconduct is the denial of an application for permission to construct a major development project. The misconduct is claimed to be both "deliberate" -- in the sense that the agency and its officials are assumed to have known what they were doing or failing to do -- and, thus, as the question is presented by petitioner, "arbitrary, capricious or illegal." No claim is made of animus or violation of

any other constitutional protection.
Cf., Daniels, 474 U.S. at 330.

"[B]ut we should not 'open the federal courts to lawsuits where there has been no affirmative abuse of power.'" Id. at 330 (quoting Parratt v. Taylor, 451 U.S. 527, 548-549 (1981) (Powell, J., concurring)). While the circumstances of the precedents for this proposition have not been a land use regulatory agency's treatment of a land use permit application, (see id. at 330-333), such a case is particularly appropriate for distinction between constitutional causes and state judicial review of administrative agency decisions. "Section 1983, upon which plaintiffs depend, does not guarantee a person the right to bring a federal suit for denial of due process in every proceeding in which he is denied a license or a permit. . . . A federal court 'should not . . . sit as a zoning

board of appeals.'" Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54, 58 (2nd Cir. 1985) (quoting Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting)).

Two assumptions underlie petitioner's claim: the Due Process Clause "was intended to secure the individual from the arbitrary exercise of the powers of government," Daniels, 474 U.S. at 331 (citations omitted), and "arbitrary exercise" of governmental powers involves a concept of substantive due process, as distinguished from procedural due process. The facile characterizations of a land use decision as "arbitrary, capricious or illegal," however, merely state the common and necessary bases for judicial review of the administrative agency decision. See, e.g., Administrative Procedure Act § 10(e), 5 U.S.C. § 706 (1991); P.R. Laws Ann. tit. 23, § 743 (1988).

That these characterizations bring into play such review mechanisms does not, absent particularization of animus or violation of another constitutional protection, make the agency action also a deprivation of due process within the meaning of the Fourteenth Amendment.

Rather, as with "traditional tort law," Daniels, 474 U.S. at 333, the mechanisms for judicial review of administrative decisions suffice, ordinarily at least, to obviate the occasion for appeal to the constitutional due process protection.¹ As Chief Justice Marshall stated, "we must never forget that it is a constitution we are expounding," McCulloch v. Maryland, 4 Wheat. 316, 407

¹ In Daniels, 474 U.S. at 333 n. 2, and Davidson, 474 U.S. at 346, the claimant had no alternative remedy. Here, petitioner was able to seek review in the commonwealth superior and supreme courts. That petitioner was unsuccessful speaks more to the lack of merit to its grievance than to the existence of any constitutional claim.

(1819), and accordingly the Court should reject rules of law which "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." Paul v. Davis, 424 U.S. 693, 701 (1976).

B. The Meaning of "Property"

Petitioner cites in its petition cases which stand for the principle that a property interest can be found in the expectation of receiving a ministerial permit, (Pet. 13-14), and asserts that respondents' permit issuing functions are "ministerial in nature." (Pet. 4) But it is difficult to accept that an agency charged with reviewing and approving or disapproving plans for construction of thousands of hotel and residential units in an environmentally sensitive area was performing a "ministerial" function.

Assuming for the sake of argument, however, that the assertion is accurate, it would show only that during the decade that the project languished petitioner could have sought the commonwealth equivalent of a writ of mandamus. It says nothing itself as to whether petitioner had a "property" right to the necessary construction permit. That a basis for mandatory relief to obtain an expected benefit exists is not itself an interest in real property created and defined by the state. Cf., Preseault v. Interstate Commerce Commission, 494 U.S. 1 (1990); Yale Auto Parts, 758 F.2d at 58.

The court of appeals, while thinking it "far from clear" whether petitioner's expectation of receiving a construction permit "constituted a property interest under Puerto Rican law" was willing so to assume. PFZ Properties, Inc. v. Rodriguez, 928 F.2d

28, 30-31 (1st Cir. 1991). The size and evident complexity of the project, as well as the process by which it would be considered for approval, convincingly demonstrate that the permission sought was a discretionary approval. And no precedent was cited by petitioner (Pet. 13-14) that supports the proposition that there is a property right in the expectation of receiving a discretionary permit.

For purposes of the procedural due process guaranteed by the Fourteenth Amendment, "property" may encompass some claims to economic benefit in such areas as public employment and welfare benefits that arise from state-established relationships of contract or regulation. But it is quite another matter to contend that the economic benefit expected from the grant of permission, required by a valid exercise of the police power, to make a

particular use of land, particularly if the decision to grant or deny the permission is discretionary, is "property" for purposes of substantive due process.

The expectation of an economic benefit from a favorable discretionary decision concerning a particular use of land is only that; it is not a "legitimate claim of entitlement." See, Board of Regents v. Roth, 408 U.S. 574, 577 (1972). This proper distinction was drawn in the context of land use regulation in Dean Tarry Corporation v. Friedlander, 826 F.2d 210 (2d Cir. 1987) and RRI Realty Corp. v. Village of Southampton, 870 F.2d 911 (1989), cert. denied 493 U.S. 893 (1990).

The gamut of points of regulatory decision from conceptual approval through preliminary and site plan approvals to construction permit to certificate of occupancy is such that

state courts are best able to judge when the process is sufficiently ripe to justify mandatory relief in a proper case, taking into account available "reasonable and prudent" alternatives.

C. Federalism and Judicial Economy

The regulation of the use of land, as well as the creation and definition of real property interests, is particularly a function of state law. This has been recognized by the Court in its general deference to state and local governments regarding land use regulation: "Implicit in this deference is the recognition that land-use regulation generally affects a broad spectrum of persons and social interest, and that local political bodies are better able than federal courts to assess the benefits and burdens of such legislation." Rogin v. Bensalem Township, 616 F.2d 680, 698 (3rd Cir.

1980), cert. denied 450 U.S. 1029 (1981).

Similarly, federal courts have given deference to state and local governments in assessing individual land use decisions, particularly where there is any element of policy-related discretion, for reasons both of federalism and of judicial economy. Otherwise, "every allegedly arbitrary denial by a town or city of a local license or permit would become a federal case, swelling our already overburdened federal court system beyond capacity." Yale Auto Parts, 758 F.2d at 58. "To permit an influx of such cases into federal courts would violate principles of federalism, promote forum-shopping, and lead to unnecessary state-federal conflict with respect to governing principles in an area principally of state concern." Id. at 59. This deference is not restricted to land use,

but applies with equal force in other areas of particular and traditional state concern such as tort law. See, e.g., Daniels, 474 U.S. at 332; Paul v. Davis, 424 U.S. 693, 701 (1976); cf. DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989).

The limited powers of the national legislature and judiciary under the Constitution reflect its principle of federalism. While the protections for the individual provided in the Constitution are predominant, the proponent of intervention under the Fourteenth Amendment by the national government in state land use decisions that are not the result of animus or a deprivation of another constitutional protection should have a heavy burden of persuasion. If the basis for such intervention is at most uncertain, the principles of judicial economy and of

the due administration of justice in controversies where the federal role is plain, militate against imposing such a heavy burden on the federal courts. "To accept [petitioner's] argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. . . . We do not think the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society." Parratt, 451 U.S. at 544.

Finally, the effect on the administration of land use regulation by a decision for petitioner in this case

would be to chill local land use decision-making. Local planning boards are largely comprised of lay, volunteer members. To expose them to damage actions by disgruntled developers would drastically restrict their ability to exercise their discretion for reasons wholly unrelated to the proper application of the Constitution.

CONCLUSION

For the foregoing reasons and the reasons submitted by the respondent and the other amici, the judgment of the Court of Appeals for the First Circuit should be affirmed.

Dated: New York, New York
January 1992

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**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1991

PFZ PROPERTIES, INC.,

Petitioner,

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RENE ALBERTO RODRIGUEZ, et al.,

Respondents.

**On Writ Of Certiorari To The United States
Court Of Appeals For The First Circuit**

**BRIEF OF THE STATES OF MARYLAND,
FLORIDA AND MAINE AS
AMICI CURIAE IN
SUPPORT OF RESPONDENTS**

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QUESTION PRESENTED

Does an arbitrary, capricious or illegal denial of a construction permit to a developer by officials acting under color of state law give rise to a substantive due process claim under 42 U.S.C. § 1983?

TABLE OF CONTENTS

	<u>PAGE</u>
QUESTION PRESENTED.....	1
INTEREST OF <u>AMICI CURIAE</u> AND SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	5
A. THE ARBITRARY, CAPRICIOUS OR ILLEGAL DENIAL OF A BUILDING PERMIT GIVES RISE TO NO SUBSTANTIVE DUE PROCESS VIOLATION.....	5
B. PETITIONER CANNOT STATE A CLAIM BASED ON SUBSTANTIVE DUE PROCESS ABSENT A SHOWING THAT STATE JUDICIAL PROCEEDINGS WERE ARBITRARY AND CAPRICIOUS....	17
CONCLUSION.....	22

TABLE OF AUTHORITIES

	<u>PAGE</u>
<u>Cases</u>	
Allegeyer v. Louisiana, 165 U.S. 578 (1897).....	9
Bishop v. Wood, 426 U.S. 341 (1976).....	6
Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987).....	9
Bowers v. Hardwick, 478 U.S. 186 (1986).....	8, 13
City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).....	16
Daniels v. Williams, 474 U.S. 327 (1986).....	5, 7, 10, 17
Davidson v. New Orleans, 96 U.S. 97 (1878).....	10, 19
Dent v. West Virginia, 129 U.S. 114 (1889).....	18
DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989).....	11
Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981).....	21
First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987).....	15
Graham v. Connor, 109 S.Ct. 1865 (1989)...	16

Griswold v. Connecticut, 381 U.S. 479 (1965).....	9
Hudson v. Palmer, 468 U.S. 517 (1984).....	20
Hurtado v. California, 110 U.S. 516 (1884).....	8
Ingraham v. Wright, 430 U.S. 651 (1977).....	10
Lincoln Federal Labor Union v. Northwestern Iron & Metal Co. 335 U.S. 525 (1949).....	9
Lochner v. New York, 198 U.S. 45 (1905).....	10
Loving v. Virginia, 388 U.S. 1 (1967).....	9
Mathews v. Eldridge, 424 U.S. 319 (1976).....	7
Moore v. East Cleveland, 431 U.S. 494 (1977).....	12,19
Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936).....	9
Murray's-Lessee v. Hoboken Land & Improvement Co., 18 How. 272 (1856)...	7
Pacific Mutual Life Insurance Co., v. Haslip, 111 S.Ct. 1032 (1991).....	7
Palko v. Connecticut, 302 U.S. 319 (1937).....	8
Patsy v. Florida Board of Regents, 457 U.S. 496 (1982).....	20
PFZ Properties, Inc. v. Rodridquez, 928 F.2d 28 (1st Cir. 1991).....	15

Regents of the University of Michigan v. Ewing, 474 U.S. 214 (1985).....	6,13,19
Rochin v. California, 342 U.S. 165 (1952).....	8,9,10,12
Roe v. Wade, 410 U.S. 113 (1973).....	9
Scudder v. Town of Greendale, 704 F.2d 999 (7th Cir. 1983).....	9
United States v. Salerno, 481 U.S. 739 (1987).....	5
West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).....	9
Whitley v. Albers, 475 U.S. 312 (1986)....	16
Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955).....	9
Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985).....	18,19,20,21
Zinerman v. Burch, 110 S.Ct. 975 (1990).....	7

Constitutional and Statutory Provisions

United States Constitution	
Fourteenth Amendment.....	passim
Fifth Amendment.....	passim

Maryland Annotated Code:

Art. 25A, §5(x).....	2
Art. 28, §7-101.....	2
Art. 28, §8-101.....	2
Art. 66B, §3.01.....	2
Env't'l Code, §4-101.....	3

Nat. Res. Code, §8-1801.....	2
Nat. Res. Code, §9-101.....	3

State Gov't Code, §10-201.....	3
State Gov't Code, §10-215(g).....	4

Law Reviews

Linde, <u>Without 'Due Process'</u> , 49 Or. L. Rev. 125 (1970).....	11
---	----

Myers, <u>The End of Substantive Due Process?</u> , 45 Wash & Lee L. Rev. 557 (1988).....	11
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**BRIEF OF THE STATES OF MARYLAND,
FLORIDA AND MAINE
AS AMICI CURIAE IN
SUPPORT OF RESPONDENTS**

Pursuant to S.Ct.R. 37, the States of
Maryland, Florida and Maine respectfully
submit this brief as amici curiae in support
of Respondents.

INTEREST OF AMICI CURIAE
AND SUMMARY OF ARGUMENT

This case involves important questions concerning individual rights, judicial power, and the ability of state and local governments to exercise their traditional regulatory functions unhindered by federal court interference. The issue of whether a disappointed applicant for a construction permit may seek review of the decision directly in federal court, simply by alleging that the denial was arbitrary and capricious, is of major importance to the States because virtually every State regulates zoning and construction activities.¹ Each such State

¹ In Maryland, for example, local governments administer planning and zoning requirements. See, e.g., Md. Ann. Code, art. 66B, §§3.01-4.08 (noncharter counties and municipalities); Md. Ann. Code, art. 25A, §5(x) (Home Rule charter counties); Md. Ann. Code, art. 28 §§7-101 to 111, 8-101 to 104 (Maryland-Washington regional district). Depending on the location, developers may also need other permits from the State. See, e.g., Md. Nat. Res. Code Ann., §§8-1801-1816 (cont.)

already provides a mechanism for the review of land use decisions, generally under a state administrative procedure act, which enables the applicant to appeal decisions that allegedly are "arbitrary or capricious." For example, the Maryland Administrative Procedure Act, which like those of most other States is patterned after the Model State Administrative Procedure Act, provides for judicial review of the "grant, denial, renewal, revocation, suspension or amendment" of any license, approval, certificate, charter, permit or registration required by law to be determined after an opportunity for a hearing. Md. State Gov't Code Ann., §§10-201 to 215. A party

(Chesapeake Bay Critical Area Protection Program); Md. Nat. Res. Code Ann., §§9-101 to 502 (Maryland Wetlands Act). Additional State and local permits also are required for certain activities attendant to construction, such as sediment control and installation of water and sewage systems. See Md. Env't'l. Code Ann., §§4-101 to 109.

aggrieved by a final decision is entitled to reversal if that party can show that the decision is unconstitutional, exceeds the authority of the agency, results from unlawful procedure or error of law, is not supported by substantial evidence or "is arbitrary or capricious." Id. at §10-215(g).

Thus, the States uniformly provide for judicial review of decisions adjudicating rights and interests accorded under state laws. There is no reason to create an additional federal forum for appealing these unexceptional decisions under the Due Process Clause.

Simply put, the Due Process Clause of the Fourteenth Amendment does not authorize the federal courts to inject themselves into land use disputes and other routine matters of purely state and local concern that involve, as this case does, allegedly arbitrary or capricious decision making.

Particularly where there is no showing that state review procedures are inadequate to correct any genuinely arbitrary or capricious state actions, this Court should not adopt a broad interpretation of the Fourteenth Amendment that substantially alters the basic relationship between the States and the federal government.

ARGUMENT

A. THE ARBITRARY, CAPRICIOUS OR ILLEGAL DENIAL OF A BUILDING PERMIT GIVES RISE TO NO SUBSTANTIVE DUE PROCESS VIOLATION.

The Due Process Clause was not meant to convert the federal courts into super zoning authorities, just as "it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." Daniels v. Williams, 474 U.S. 327, 332 (1986).² Profound considerations of

² See, e.g., Scudder v. Town of Greendale, 704 F.2d 999, 1003 (7th Cir. 1983) ("Were we (cont.)

federalism counsel against an interpretation of the Constitution that would promote needless federal-state friction in areas of significant state and local concern. Cf. Bishop v. Wood, 426 U.S. 341, 349 (1976) ("federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies"); Regents of University of Michigan v. Ewing, 474 U.S. 214, 226 (1985) (federal court not the appropriate forum in which to review "the substance of the multitude of academic decisions that are made by faculty members at public educational institutions").

The Due Process Clause of the Fourteenth

to accept the plaintiff's argument that a mere denial of an application for a building permit, in a fact situation such as this, per se constitutes a violation of the federal Constitution, virtually every routine denial of the building permit would become a potential federal case. . . . "[I]t is not the function of federal district courts to serve as zoning appeals boards." (quotation omitted).

Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law."³ In addition to embracing a procedural component that guarantees that government action must be implemented in a fair manner, see, e.g., Mathews v. Eldridge, 424 U.S. 319, 335 (1976), "the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" Zinerman v. Burch, 110 S.Ct. 975, 983 (1990), quoting Daniels v. Williams, 474 U.S. 327 (1986).

³ This Court long ago found that the words "due process of law" "conveyed 'the same meaning as the words 'by the law of the land,' in Magna Carta" and impose " 'a restraint on the legislature as well as on the executive and judicial powers of the government.' " Pacific Mutual Life Insurance Co. v. Haslip, 111 S.Ct. 1032, 1049 (1991) (Scalia, J., concurring), quoting Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 276 (1856).

Substantive due process is not, however, a catch-all for review of any state action that is capable of being described as arbitrary or capricious; instead, its scope is far narrower, reaching only to prevent "the government from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.'" United States v. Salerno, 481 U.S. 739, 746 (1987), quoting Rochin v. California, 342 U.S. 165, 172 (1952); Palko v. Connecticut, 302 U.S. 319, 325-26 (1937).

This Court has interpreted the Due Process Clause "to secure the individual from the arbitrary exercise of the powers of government," Hurtado v. California, 110 U.S. 516, 527 (1884) (quotations omitted), in areas involving fundamental rights and liberties. See Bowers v. Hardwick, 478 U.S. 186 (1986) (fundamental rights related to family, marriage and procreation held not to

extend to homosexual activity); Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546 (1987) ("the relationship among Rotary Club members is not the kind of intimate or private relation that warrants constitutional protection").⁴

⁴ Although the Due Process Clause was at one time interpreted to invalidate state economic legislation, see, e.g., Morehead v. New York ex rel. Tipaldo, 298 U.S. 587, 617-18 (1936); Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897), that interpretation was abandoned in the late 1930's, see West Coast Hotel Co. v. Parrish, 300 U.S. 379, 397-400 (1937), and has since been expressly repudiated. See Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487-88 (1955); Lincoln Federal Labor Union v. Northwestern Iron & Metal Co. 335 U.S. 525, 536-37 (1949). Indeed, in recent years this Court has recognized substantive due process rights only in cases dealing with liberty interests rather than property or other economic regulation. See, e.g., Rochin v. California, 342 U.S. 165 (stomach pumping of suspect for drugs invalidated); Griswold v. Connecticut, 381 U.S. 479 (1965) (regulation of use of contraceptives by married couples held to be unlawful); Loving v. Virginia, 388 U.S. 1 (1967) (invalidating miscegenation law because of its interference with freedom to marry); Roe v. Wade, 410 U.S. 113 (1973) (right of privacy extended to include right to terminate a pregnancy).

Substantive due process also extends to deliberate rather than careless government action, see Daniels v. Williams, 474 U.S. 327, encompassing conduct that imposes "unjustified intrusions on personal security," Ingraham v. Wright, 430 U.S. 651, 673 (1977) (footnote omitted), through "methods too close to the rack and the screw to permit of constitutional differentiation." Rochin v. California, 342 U.S. at 172.

However, over a century ago this Court rejected the view that the Due Process Clause could be used "as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant . . . of the justice of the decision against him. . . ." Davidson v. New Orleans, 96 U.S. 97, 164 (1878). Yet Petitioner advances the same discredited interpretation of the Fourteenth Amendment in asking this Court to clothe its permit grievance in

constitutional garb, as "[e]very appeal by a disappointed developer from an adverse ruling by a local . . . planning board necessarily involves some claim that the board exceeded, abused or 'distorted' its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason." App. Pet. Cert. 8a (quotations omitted).

The Due Process Clause does not impose any " 'constitutional obligation on government to behave 'reasonably' or to avoid 'arbitrary' action. . . . 'Arbitrary' and 'capricious' are not constitutional terms.'" Myers, The End of Substantive Due Process?, 45 Wash. & Lee L. Rev. 557, 617 (1988), quoting Linde, Without 'Due Process,' 49 Or. L. Rev. 125, 167 (1970). Cf. DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989) (absent independent constitutional duty, mere

allegation that child was harmed due to governmental conduct that "shocks the conscience" does not state a claim for violation of substantive due process). There is, in fact, "no express constitutional language granting judicial power to invalidate every state law [or action] of every kind deemed 'unreasonable' or contrary to the Court's notion of civilized decencies." Rochin v. California, 342 U.S. at 176 (Black, J., concurring) (emphases omitted).

Given the absence of constitutional language to guide and limit an interpretation of the Due Process Clause, "[s]ubstantive due process has at times been a treacherous field for this Court," Moore v. East Cleveland, 431 U.S. 494, 502 (1977), as evidenced by the history of the state economic regulation cases which resulted in a broad "repudiation of much of the substantive gloss that the

Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expanding the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental." Bowers v. Hardwick, 478 U.S. at 194-95.

This case is simply not an appropriate vehicle for the Court "to discover new fundamental rights imbedded in the Due Process Clause." Bowers, 478 U.S. at 195. Petitioner's interest in a construction permit derives exclusively from land use procedures established by Puerto Rico law. That interest "bears little resemblance to the fundamental interests that previously have been viewed as implicitly protected by the Constitution." Regents of the University of Michigan v. Ewing, 474 U.S. at 229-30 (Powell, J., concurring).

Nothing in this Court's jurisprudence remotely suggests that this case involves any of the rights or liberties or government action that have in the past triggered the protections of substantive due process. As the court of appeals below noted, Petitioner "alleges no facts that would suggest discrimination based on an invidious classification such as race or sex," App. Pet. Cert. 8a, and this case raises no claim that "the project approval procedures established by Puerto Rico law and by [Respondent] ARPE's custom and practice violate the Due Process Clause of the federal Constitution." App. Pet. Cert. 5a. Similarly, Petitioner alleges no unfairness or "arbitrary" or "capricious" behavior by either the Superior Court of Puerto Rico, which affirmed the denial of Petitioner's building permit, App. Pet. Cert. 3a, or the Supreme Court of Puerto Rico, which denied

review of Petitioner's appeal. Id. There is no substantive due process right to be free of the government action complained of here.

To the extent Petitioner alleges a denial of property, his claim should be analyzed under the Just Compensation Clause. See generally First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987).⁵ To the extent Petitioner's claim is that the Commonwealth arbitrarily or capriciously singled him out in applying local law, then that claim should be analyzed under the Equal Protection Clause of the Fourteenth Amendment. See generally

⁵ Petitioner initially raised but then abandoned such a taking claim in the district court. App. Pet. Cert. 4a. The Court of Appeals for the First Circuit appropriately expressed doubts about whether "PFZ's expectation of receiving a construction permit from ARPE constituted a property interest" PFZ Properties, Inc. v. Rodriguez, 928 F.2d 28, 30-31 (1st Cir. 1991). Absent a property interest, of course, there could have been no claim of a taking.

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (denial of special use permit for operation of group home for the mentally retarded violated the Equal Protection Clause). But because those "Amendment[s] provide[] an explicit textual source of constitutional protection against this sort of intrusive governmental conduct, th[ose] Amendment[s], not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." Graham v. Connor, 109 S.Ct. 1865, 1871 (1989) (footnote omitted).⁶

Petitioner's claim might be reviewable under these more specific constitutional

⁶ See also Whitley v. Albers, 475 U.S. 312, 327 (1986) ("Because this case involves prison inmates rather than pretrial detainees or persons enjoying unrestricted liberty . . . the Due Process Clause affords no greater protection than does the Cruel and Unusual Punishments Clause."); Daniels v. Williams, 474 U.S. at 340 n. 16 (Stevens, J., concurring).

provisions. This case presents no justification, however, for this Court to adopt Petitioner's sweeping and unprecedented interpretation of the Due Process Clause.

B. PETITIONER CANNOT STATE A CLAIM BASED ON SUBSTANTIVE DUE PROCESS ABSENT A SHOWING THAT STATE JUDICIAL PROCEEDINGS WERE ARBITRARY AND CAPRICIOUS.

Even if the Court were to recognize a due process right to be free of arbitrary or capricious government action in the area of construction permits, this Court should condition federal court intervention on adequate allegations that the totality of state action caused constitutional injury. Absent a threshold showing that the state courts acted in an arbitrary or capricious manner in conducting their review of the agency decision, a disappointed permit applicant cannot be deprived of "life, liberty, or property, without due process of law."

This Court in Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985), held that a claim that the State unconstitutionally exercised its regulatory powers in the zoning context was not ripe for review until the claimant availed itself of the procedures provided by the State for obtaining just compensation, regardless of whether the property owner's claim "is analyzed as a deprivation of property without due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment." Williamson, 473 U.S. at 200 (footnote omitted). Early due process decisions of this Court, moreover, show that "[t]here is nothing of an arbitrary character," if, should there "be any unfair or unjust action on the part of the board . . . [,] a remedy would be found in the courts of the state." Dent v. West Virginia, 129 U.S.

114, 124-25 (1889).⁷

Here, Puerto Rico law authorized the Superior Court of Puerto Rico to review the precise arbitrary, capricious and illegal conduct that Petitioner challenges. App. Pet. Cert. 5a; 18a; quoting 23 L.P.R.A. § 72. Petitioner utilized that judicial remedy but made no showing that the Puerto Rico courts denied him fair and adequate review of his claim. There can be no substantive due process violation, therefore, because "the State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate post deprivation remedy for the property loss,'" Williamson, 473 U.S. at 195, quoting

⁷ See also Davidson v. New Orleans, 96 U.S. 97, 105-06 (1878) ("[T]he party complaining here appeared and had a full and fair hearing in the court of the first instance, and afterwards in the Supreme Court. If this be not due process of law, then the words can have no definite meaning as used in the Constitution.").

Hudson v. Palmer, 468 U.S. 517, 532 n.12 (1984), and that remedy was both provided and adequate here.

To accommodate the State interest in local land use decisions in the context of Petitioner's application for a construction permit, and the countervailing federal interest in safeguarding against "arbitrary or capricious" deprivations of fundamental rights, the federal courts should not be involved unless the applicant could show that the judicial review process in the State courts itself also was arbitrary or capricious in a constitutional sense, that is, that the state agency and courts engaged in deliberate and unjustified action affecting fundamental rights through conduct that shocks the conscience.⁸ It is not

⁸ This approach would no more run afoul of the principle that exhaustion of review procedures is not required, see Patsy v. Florida Board of Regents, 457 U.S. 496 (cont.)

enough to allege that the state court decisions are arbitrary or capricious merely because they rejected a party's argument.

Absent this heightened showing, federal courts would become alternative fora for appeals of administrative decisions in areas affecting important state interests. Petitioner "would be able to invoke federal judgments without first permitting the State to rectify any alleged impropriety." Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 114 (1981). In addition, the very maintenance of the suit would intrude on the enforcement of the state scheme. State officials could be summoned to federal court to defend their actions merely on the assertion that the decision was arbitrary or

(1982), than does the Court's approach in the Just Compensation arena. See Williamson, 473 U.S. at 193. The issue here is whether the Petitioner is able to allege that the State's final decision inflicts an actual, concrete constitutional injury, not whether all procedures for review have been exhausted.

capricious. Allowance of such claims would result in this Court being a source of appellate review of all state decisions. Id. Principles of federalism and comity preclude such disruptive interference with historic state interests.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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